

1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

2  
3 JAKE CORMAN, in his official )  
4 capacity as Senator from the )  
5 34th Senatorial District of )  
6 Pennsylvania and Chair of the )  
7 Senate Committee on )  
8 Appropriations; and ROBERT M. )  
9 McCORD, in his official )  
10 capacity as Treasurer of the )  
11 Commonwealth of Pennsylvania, )

Case No.  
1 M.D. 2013

12 Plaintiffs, )

13 vs. )

14 NATIONAL COLLEGIATE ATHLETIC )  
15 ASSOCIATION, )

16 Defendant, )

17 vs. )

18 PENNSYLVANIA STATE UNIVERSITY, )

19 Defendant. )

20 DEPOSITION OF DAVID BERST  
21 Indianapolis, Indiana  
22 Wednesday, November 12, 2014

23 Reported by:

24 RACHEL F. GARD, CSR, RPR, CLR, CRR

25 JOB NO. 86746

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November 12, 2014  
9:05 a.m.

Deposition of DAVID BERST, at the offices  
of Barnes & Thornburg, 11 South Meridian  
Street, Suite 200, Indianapolis, Indiana,  
pursuant to subpoena before Rachel F. Gard,  
Illinois Certified Shorthand Reporter,  
Registered Professional Reporter, Certified  
LiveNote Reporter, Certified Realtime Reporter,  
Indiana Notary Public.

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1 (Witness sworn.)

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3 Q. Good morning, Mr. Berst. My name is  
4 Matt Haverstick, and I represent Senator Jake  
5 Corman, State Senator from Pennsylvania. And I  
6 think you met them already, but I have my  
7 colleagues, Alexis Madden and Mark Seiberling  
8 is at the very end and Kevin McKenna is also  
9 with us.

10 So I gather you've been deposed  
11 before?

12 A. Yes.

13 Q. And testified before?

14 A. Yes.

15 Q. I'm not going to bother with all the  
16 preliminaries. I think you know all of that  
17 stuff.

18 I'm -- go ahead.

19 A. Well, yes, I'll bother with a little  
20 preliminary.

21 Q. Please, do.

22 A. I just want to ensure that there are  
23 notes available from you overnight or however  
24 quickly that is done because I want access to  
25 them as well.

1 Q. To the --

2 A. Deposition.

3 Q. Yeah, sure. That's up to you and  
4 your counsel. Sure, you, I'm sure, will get an  
5 opportunity to look at whatever is recorded by  
6 the recorder today.

7 A. Yeah, I may well use it myself.

8 Q. Okay. So you know the drill. I'll  
9 be asking questions as we go out, go along  
10 through today. Actually, it's rare that I get  
11 to talk to someone as interesting as you, and I  
12 don't mean that as false flattery. I think  
13 this will be an interesting conversation. And  
14 some of my questions will be more sterile, and  
15 they will be readily discernible where I'm  
16 driving or what I'm asking for. And others are  
17 more conversational and maybe more  
18 philosophical. And I hope we can have a  
19 conversation because that's sort of how I look  
20 at what we're going to do today, for the most  
21 part.

22 Is that okay with you?

23 A. That would be wonderful.

24 Q. From time to time, I'll show you  
25 documents. We'll sort of play that as it lays,

1 I think, but if you need to take a look at a  
2 document for a couple minutes when I show  
3 you -- in fact, if you need to take a break  
4 whenever, just let me know and we can go do  
5 that.

6 One issue that we've been running  
7 into, and I'm just going to flag it for you and  
8 put it on the table so we don't get confused  
9 about it later on.

10 There's going to be questions where  
11 Donald Remy is going to come up and your  
12 counsel, quite correctly, is going to tell you,  
13 if I'm asking about a conversation between you  
14 and Donald Remy in which you and Donald are  
15 conversing for the purpose of Donald giving you  
16 legal advice, that's something that your  
17 counsel is going to tell you not to answer.  
18 And that's fair. That's fair.

19 I'd ask if you're having a  
20 conversation with Donald or there's one  
21 reflected in an email and you can tell me  
22 honestly from your memory, you know, I wasn't  
23 talking to Donald to get legal advice, we were  
24 doing it for some other reason, my view is that  
25 is fair game. But I'm saying it now so that

1 you -- again, so we don't have to hit it every  
2 single time we hit with a Donald Remy question  
3 and that you're sensitized to it. So you can  
4 stop and pause or talk to your counsel if you  
5 need to think, wait a minute, is this one where  
6 I was talking to Donald for legal advice, or is  
7 this for something else. Okay?

8 MR. KOWALSKI: I just add to that,  
9 there may be instances where we have an  
10 understanding from the association's  
11 perspective or from Mr. Remy's perspective  
12 what the purpose of certain communications  
13 were, and so we do ask you to be very  
14 careful about revealing the contents of any  
15 communications with Donald Remy before we  
16 have an opportunity to fully evaluate  
17 whether they may be privileged.

18 A. I think my involvement is narrow  
19 enough that I should be able to work my way  
20 through that.

21 Q. Okay. Good.

22 Why don't we start where these  
23 always start. Tell me a little bit about  
24 yourself and your background.

25 A. I am probably, I guess, the most

1 senior staff member on the NCAA staff. I  
2 started in 1972 after a brief period of time  
3 where I was an assistant basketball/head  
4 baseball coach at McMurray College. I started  
5 as a field investigator. Became director of  
6 enforcement. Subsequently head of the  
7 enforcement program and eligibility of appeals  
8 sections of the regulatory area for -- I  
9 probably managed that area around 25 years or  
10 so.

11 And then for the last 15 or so, I've  
12 been vice president for Division I, which means  
13 that I facilitate, manage general policies that  
14 affect Division I institutions. I work with  
15 the presidential board of directors that adopts  
16 legislation, passes policies in Division I.

17 I was envoy in major issues  
18 affecting athletic directors, commissioners,  
19 others, coaches around the country, serve on  
20 the National Association of Basketball Coaches  
21 board of directors. I deal with, then, most of  
22 the so-called power coaches in sports in  
23 Division I. I'm sort of a generalist. So I've  
24 gone from the so-called regulatory, more  
25 prosecutorial area to the area where you

1 establish policies going forward.

2 Q. A question or two about that first  
3 category that you mentioned, the -- I suppose  
4 it was director of enforcement.

5 Did I get the title right?

6 A. Well, I was for a while. I became  
7 assistant executive director and then vice  
8 president. Everyone usually wanted to talk to  
9 the director of enforcement. And when that  
10 happened and I was a supervisor, I quickly  
11 transferred the line to the director but became  
12 known as the director of enforcement, yes.

13 Q. What -- and I don't expect every  
14 single duty or responsibility. But in a  
15 summary fashion, tell me what one in that job  
16 does or handles.

17 A. We collected information related to  
18 potential alleged violations of NCAA rules in  
19 all areas, often recruiting on the major -- you  
20 know, in the major revenue sports would  
21 probably be the most likely candidates for  
22 investigations where we developed sufficient  
23 information. To inquire further, I would  
24 submit a letter of preliminary inquiry to the  
25 institution in order to advise them that they

1 were to be investigated by the enforcement  
2 staff.

3 We'd set out to do so on campus and  
4 elsewhere, wherever you might first develop the  
5 most truthful information possible.

6 Eventually, if we were able to  
7 establish sufficient information that we  
8 believed the committee on infractions, which is  
9 a peer group of faculty and lawyers and others  
10 from schools who act as judges in these  
11 matters, if we were to believe they might make  
12 findings of violations and assess a penalty, we  
13 would submit a letter of official inquiry  
14 requiring an institution to go back out,  
15 collect direct information much like we did,  
16 and for all of us, then, to appear before the  
17 peer group of committee on infractions members  
18 to evaluate the information and eventually  
19 assess penalties, if appropriate, pending  
20 appeals and so forth.

21 Q. The initial letter that goes to  
22 institutions, is that a public letter, or is  
23 that a private letter?

24 A. It's private from our perspective.  
25 We don't announce it, but we send it directly

1 to either the president or the chancellor of  
2 the institution signed by the head of the  
3 enforcement program.

4 Q. Does it list potential violations of  
5 NCAA bylaws and regulations and rules? Or is  
6 it a general document saying we're looking at  
7 you?

8 A. It has evolved over time. I would  
9 submit something quite general very early on,  
10 and as I was conducting the programs, they  
11 became more structured following that and  
12 became more specific in regard to areas of  
13 inquiry. Often pointing out either the methods  
14 or the areas that we might be inquiring into.

15 Q. That letter, and tell me if it's  
16 different than it would be today, does that  
17 letter do anything more, require anything more  
18 than notice for the institution to determine --  
19 just to put them on notice? In other words,  
20 does it require the institution to respond?  
21 Does it require the institution to gather  
22 documents for you?

23 MR. KOWALSKI: Objection to form.

24 A. Well, any of the above are  
25 possible --

1 Q. Okay.

2 A. -- ways to frame it. Often as I was  
3 beginning to operate the program, I wanted to  
4 control the information and where we might go.  
5 So for me, it was more notice. And then that  
6 at least alerted the institution that we would  
7 be conducting inquiries.

8 I'd say it's probably much more  
9 specific now at this point.

10 Q. Who, if there is a typical, who  
11 typically would be the signatory on behalf of  
12 NCAA of that first letter?

13 A. For me, it was me as head of the  
14 enforcement program. Now it would be the vice  
15 president of enforcement.

16 Q. And who's that?

17 A. John Duncan.

18 Q. I'm going to paraphrase just so I  
19 don't waste all your time. I'm sure there are  
20 things you'd rather be doing than sitting in  
21 this room all day.

22 It sounds to me like, tell me if  
23 I've got it right, that letter is sort of a  
24 notice the NCAA may conduct a formal  
25 investigation or may refer to the committee on

1     infractions, you're putting the institution on  
2     notice, NCAA then goes and does its own  
3     investigation of potential violations?

4             MR. KOWALSKI:  Objection.

5             A.     It's a letter that says we are, in  
6     fact, going to conduct an investigation.  We're  
7     on it, and we have enough for us to be curious  
8     about what the rest of the information is that  
9     may be available.  At the end of that process,  
10    you could still make a decision --

11            Q.     Not to --

12            A.     -- we've got not enough or we have  
13    more than we anticipated and we're going to  
14    draft the official letter of inquiry.

15            Q.     Your NCAA investigators in that  
16    interim period before a decision is made on  
17    what to do with the committee of infractions  
18    are the ones doing the investigation?

19            A.     They, for the most part, are.  Could  
20    be anyone from the association.  Actually,  
21    there probably were assignments to people who  
22    were even outside the staff during the time I  
23    was conducting the program, and there is the  
24    ability of the infractions process or the  
25    enforcement staff to collect information from

1 any source. So we get information from  
2 newspaper articles, for example. That would be  
3 enough for us to think about do we need to  
4 collect some additional information, and we  
5 might do that without any notice at all to an  
6 institution.

7 When we reach the point where we  
8 think, well, this really does seem to be enough  
9 reasonably reliable information to conduct  
10 further inquiries, then that's the point where  
11 the letter is required.

12 Q. The folks outside of your  
13 enforcement staff who get involved could be  
14 officials at the conferences?

15 A. Sure. Could be anyone.

16 Q. Could it be outsourced? Does  
17 enforcement do that, hire investigators to go  
18 do enforcement investigations for them?

19 A. I'm sure that's happened on  
20 occasion. I had, yes, 25 arson investigators  
21 actually who, as a sidelight, were contracted  
22 with me to conduct inquiries with highly  
23 recruited student athletes or prospects to ask  
24 them what went on in their recruitment or  
25 whether there were any things that caused

1 concern related to NCAA rules. So sure. You  
2 could do it that way. You could receive  
3 information from any source.

4 Q. Curiosity, there wasn't any  
5 particular reason they were arson investigators  
6 other than they were just investigators, it  
7 wasn't like these kids were suspected of  
8 setting fires, were they?

9 A. No. My hope was that it was a group  
10 of folks with some enforcement background and  
11 integrity to be able to conduct inquiries on  
12 our behalf. It was a failed effort, however.

13 Q. What was that effort?

14 MR. KOWALSKI: Objection.

15 A. Well, I used them as an additional  
16 set of resources to conduct inquiries, and I  
17 didn't think they were very effective at doing  
18 it. So I disbanded the program.

19 Q. Do you recall whether those  
20 investigators were part of a private  
21 investigative organization or business, or were  
22 they just sort of ad hoc, you were finding  
23 investigators and then hiring them for the  
24 special task?

25 MR. KOWALSKI: Object to form.

1           A.     It was an organization of arson  
2     investigators. I don't remember the acronym  
3     for them. But they existed, you know,  
4     throughout the country.

5           Q.     Was there one particular  
6     investigation on which you used these fellows,  
7     or was it several investigations that didn't  
8     pan out?

9           A.     I used them in several  
10    investigations, and I would not say it didn't  
11    pan out. I would say they simply weren't as  
12    effective as people who were full-time  
13    employees and subject to coming back and  
14    debriefing and so forth. They were more fans  
15    of power coaches than they were effective  
16    investigators.

17          Q.     Roughly what time frame are we  
18    talking about, if you recall?

19          A.     That would have been the '80s.

20          Q.     I'm going to get back into my little  
21    crib note on what I think the enforcement  
22    process is.

23                   Once your investigation is complete,  
24    enforcement decides whether it's going to, this  
25    is my word, not yours, file a formal complaint

1 with the committee on infractions, is that  
2 roughly right?

3 MR. KOWALSKI: Objection to form.

4 A. No. If the enforcement staff  
5 concludes that it has sufficient information  
6 that causes them to believe that it's likely  
7 there would be a finding of violation if the  
8 matter is pursued with the committee on  
9 infractions, the specific allegations of  
10 wrong-doing are submitted to the institution  
11 itself. And the institution then is required  
12 to investigate, respond for the purpose of  
13 taking it to the committee on infractions.

14 Q. Once that processed commenced, that  
15 is where you notify the institution of a  
16 probable violation of NCAA rules and  
17 regulations, does automatically the results go  
18 to the committee on infractions?

19 A. I suppose it's possible for the  
20 matter to be adequately addressed so that there  
21 does not seem to be a violation necessary for  
22 review or further consideration by the  
23 committee on infractions.

24 Q. When the staff is making the  
25 determination that we are talking about, am I

1 right that they are taking a look at the facts  
2 as they develop and comparing them to NCAA  
3 rules, regulations, bylaws, et cetera, and  
4 trying to match up whether there was a  
5 violation?

6 MR. KOWALSKI: Objection to form.

7 A. Yes. I think that's right.

8 Q. Okay.

9 A. Just recognizing that there are two  
10 formal spots where the first is what I call the  
11 letter of preliminary inquiry, saying, school,  
12 we're looking.

13 Q. Right.

14 A. You need to know.

15 Second is we made the decision that  
16 there is, in fact, something that we should  
17 take to the committee on infractions, and  
18 that's called a letter of official inquiry.

19 Q. And who sends that?

20 A. The head of the enforcement program.  
21 Me or in the past -- well, or now would be John  
22 Duncan. Prior to that, would be Julie Roe.  
23 Prior to that, would be David Price.

24 Q. Are those letters confidential from  
25 NCAA's perspective?

1           A.       We don't release them.  Many  
2 institutions do, due to open records concerns.

3           Q.       Ah.

4                   Now, as I understood your answer at  
5 the point the institution gets that letter, it  
6 can attempt to remediate the issue, convince  
7 NCAA that it didn't violate a rules infraction?  
8 Something else?  Is that possible?

9                   MR. KOWALSKI:  Objection to form.

10          A.       It's more the latter.  They're  
11 required to collect information to determine  
12 what they believe the findings of fact are.  
13 There's no plea bargain in NCAA processes.

14          Q.       If the matter is not resolved by the  
15 institution doing its own review, it moves onto  
16 the committee for infractions?

17                  MR. KOWALSKI:  Objection to form.

18          A.       If -- I'm not sure I follow.  If  
19 there's no -- you mean if the staff receives a  
20 response from the institution and the staff  
21 concludes that its information and facts are  
22 more persuasive than those submitted by the  
23 institution, then it does go to hearing before  
24 the committee on infractions.

25          Q.       That's -- I didn't say it obviously

1 as well as you did.

2 Your section, your unit, your  
3 division, not yours now but yours then, would  
4 act as the prosecutors in any kind of action,  
5 for lack of a better term?

6 MR. KOWALSKI: Object to the form.

7 A. Yeah, it really is the wrong term.  
8 In our processes, even though I think I used  
9 that word earlier, it's an attempt to develop  
10 full facts. So the idea of this is not that  
11 institutions go on the defense. In fact, that  
12 usually works against institutions to, say,  
13 come and get us if you can, NCAA. And I would  
14 make that point during hearings.

15 The idea was for us, we are supposed  
16 to be in the enforcement area, at least an  
17 objective collector of facts, both exculpatory  
18 and inculpatory and we work with the  
19 institution to discover their versions of the  
20 facts as well as any involved individuals'  
21 versions of the facts and put all of that on  
22 the table before the committee on infractions  
23 to make a judgment.

24 Q. Interesting. So that when there is  
25 a hearing before the committee on infractions,

1 enforcement may actually be putting on evidence  
2 that is exculpatory as well as inculpatory  
3 because you're trying to tell them this is what  
4 happened?

5 MR. KOWALSKI: Objection to form.

6 A. Correct.

7 Q. And then it's, I imagine, the  
8 institution's burden to challenge your evidence  
9 and your presentation of what you believe the  
10 objective facts are at that point?

11 MR. KOWALSKI: Object to form.

12 A. I'd say the burden is on the  
13 enforcement staff. The enforcement staff would  
14 have to present persuasive information to  
15 overcome whatever information the institution  
16 or individuals submit.

17 Q. As part of the hearing process, is  
18 there also a presentation to demonstrate to the  
19 infractions committee that not only are the  
20 facts as we present them, these facts amount to  
21 violations of NCAA policy?

22 MR. KOWALSKI: Objection to form.

23 A. During my time, yes. I would do  
24 those types of summaries of what I thought this  
25 particular case amounted to, looked like, and

1 how it should be considered. I don't know  
2 precisely what occurs now. I've been out of  
3 that area for 15 years, so I can't tell you  
4 precisely how they do that now.

5 Q. Do you have reason to think it's  
6 different materially than it was when you did  
7 it?

8 A. Well, there are -- there are many  
9 differences in enforcement program than when I  
10 did it in 1998. So I don't know.

11 Q. Okay.

12 A. I don't know how to answer that.

13 Q. When you -- when you did it -- and  
14 if you know if it's different, I'd appreciate  
15 if you'd educate me on it -- during this  
16 hearing process and assuming that violations  
17 are determined, is it the committee's role to  
18 then move on and develop sanctions?

19 A. Yes, it is.

20 Q. Does the sanctions process, I'm  
21 going to revert back to what I know which is  
22 sort of the criminal process, where there would  
23 be the liability phase and then the penalty  
24 phase, does it work that way in the commission  
25 too -- I'm sorry, for the infractions

1 committee?

2 MR. KOWALSKI: Objection to form.

3 A. I'd say usually, no. There's not a  
4 separate process or hearing. At a so-called  
5 sentencing stage, there would be simply the  
6 committee on infractions assessing the number  
7 and nature of violations involved and  
8 determining from the time I was involved  
9 whether they were -- whether they supported  
10 either secondary or major violations of NCAA  
11 rules and then, if so, determine what the  
12 appropriate penalties should be given the  
13 individual nature of each case.

14 Q. Does the enforcement division  
15 advocate for a particular penalty -- let me ask  
16 it, break it up.

17 Does it advocate for a particular  
18 penalty?

19 A. In my time, no. I doubt if that  
20 would happen now.

21 Q. Does or did the enforcement group  
22 present evidence to the committee on  
23 infractions on what penalties are possible  
24 given the facts?

25 MR. KOWALSKI: Objection to form.

1           A.     In the very early stages, they did  
2     or I did. In the '70s, they were what I  
3     considered to be moving into the role. At that  
4     time, you didn't have additional staff members  
5     to work with the committee on infractions, so I  
6     served as both the presenter and then I was the  
7     second secretary basically to the committee on  
8     infractions.

9           So I would present a series of cases  
10    that looked similar depending on how they might  
11    consider the findings in the case for their --  
12    as a resource to the committee. That, I'm sure  
13    does not happen anymore or if it does, it is in  
14    the second phase where the hearings are over,  
15    the enforcement staff is gone. At that point,  
16    then you have the committee on infractions and  
17    their own staff that might do research for the  
18    committee.

19          Q.     So we --

20          A.     So that's separated.

21          Q.     Okay. So we think now, today,  
22    enforcement would be less involved in  
23    discussing the sanctions phase --

24          A.     They're not involved at all.

25          Q.     At all. The committee would, on its

1 own work, out what it thought should happen  
2 with respect to sanctions?

3 A. Correct.

4 Q. Would there be input requested from  
5 enforcement or solicited from enforcement, if  
6 you know?

7 MR. KOWALSKI: You mean right now?

8 Q. Yeah, right now.

9 A. I don't know if that would occur.  
10 There would be a requirement that if that kind  
11 of thing were to happen, I think both parties  
12 have to be ill advised. There must be some  
13 missing piece of information that they need to  
14 take into consideration.

15 Q. Okay.

16 A. I don't remember that ever being  
17 anything different.

18 Q. Tell me a bit about your role now.  
19 What do your job duties entail today?

20 A. Well, now I'm still -- I still have  
21 something of a regulatory bent, I guess. But  
22 in governance, we have a series of processes to  
23 consider new pieces of legislation or other  
24 issues that are facing the association like  
25 should we do something different about how

1 transfer rules work? Should we have cost of  
2 attendance for some or all student athletes? I  
3 facilitate and work with the various groups  
4 that can bring that to the appropriate  
5 legislative processes to have a vote of either  
6 membership or board of directors or legislative  
7 council or leadership council.

8 I work with over a hundred  
9 committees that are made up of groups of  
10 individuals from all of our institutions in  
11 pursuing their own agendas. So I'm supposed to  
12 know all of those things and figure out how to  
13 get them resolved reasonably from the  
14 perspective of whoever it is that's advocating  
15 a particular position.

16 Q. Does that involve, in your position,  
17 drafting new legislation?

18 A. Hopefully, no, because I usually  
19 have somebody that will do it.

20 Q. Okay.

21 A. But I certainly review it and am  
22 involved in helping with intent or rationale  
23 often.

24 Q. I gather that when there are issues  
25 of potential new legislation, you have staffers

1 who are busy at your direction writing  
2 potential new legislation?

3 A. Yes.

4 Q. And then you -- but you ultimately  
5 have to sign off on it and you would be  
6 generally aware of what they're doing and  
7 interacting with them?

8 MR. KOWALSKI: Objection to form.

9 A. I don't really have a sign off  
10 because there may well be differences of  
11 opinion about whether something should go  
12 forward or what form it ought to take. I try  
13 to help, nudge, or push or influence, but it's  
14 usually not my final decision on what it is  
15 that's going to go up for a vote. It's going  
16 to be the sponsor of the actual initiative.

17 Q. That's whose decision it is to  
18 determine whether a legislative issue is going  
19 to be pushed?

20 A. Yes.

21 Q. And those sponsors come either from  
22 the institution level or the committee level,  
23 those are people who are sort of granular in  
24 dealing with their own --

25 MR. KOWALSKI: Objection to form.

1           A.       That's in part, yes, as well as  
2 conferences and even the board of directors  
3 itself.

4           Q.       Legislatively, talk me through the  
5 process by which new rules, new bylaws, new  
6 whatevers are approved so that they are  
7 effective and enforceable by NCAA?

8           MR. KOWALSKI: I object to form.

9           Just I don't know if there's a distinction  
10 between rules, bylaws, and whatever, but  
11 you might want to take it --

12          MR. HAVERSTICK: Sure.

13          MR. KOWALSKI: If there's a  
14 difference, you might --

15          A.       There are, as far as legislation is  
16 concerned, the bylaws, there are two processes.  
17 One is called an autonomy process whereby five  
18 conferences within the association, the highest  
19 resource conferences have an explicit set of  
20 areas where they can draft legislation for  
21 consideration. And the annual deadline to  
22 submit that kind of legislation is September 1.

23                 And thereafter, there's an amendment  
24 period involving those same five conferences,  
25 and then that January convention, there is a

1 business session for discussion first of  
2 whatever pieces of legislation are to be  
3 considered and then actual voting by 65 schools  
4 and 15 student athletes. That would be bylaws  
5 that are explicit to them.

6 Bylaws that are not explicit to the  
7 autonomy group go through a similar deadline of  
8 September 1 for submission. Then an amendment  
9 period. Ultimately, a discussion forum in  
10 January at the NCAA convention, and then voting  
11 by a group called the NCAA -- the Division I  
12 council, which is a 40-member representative  
13 group from the 32 conferences, adding faculty  
14 representatives and student athletes and  
15 commissioners to that group who would vote by  
16 majority in April on whether those pieces of  
17 legislation would be adopted effective the  
18 following fall. Both areas would both usually  
19 be effective the following fall.

20 There are sometimes constitutional  
21 provisions that would be submitted often by a  
22 group like the board of directors or even  
23 pursued by the executive committee of the  
24 association, which is a broader, overarching  
25 group. And those typically, if they go forward

1 as a change in the constitution, would require  
2 a vote, two-thirds majority vote of all  
3 Division I members, 350-ish or so plus 32  
4 conferences at convention assembled in January.

5 Q. Is that subject to veto?

6 A. Yes, it can be rescinded in effect  
7 by two-thirds majority of the membership during  
8 a 60-day period after those matters are  
9 adopted.

10 The autonomy legislation is not  
11 subject to rescision because all the  
12 institutions actually vote on those.

13 Q. What five conferences, by the way,  
14 are implicated? You mentioned there were five.

15 A. The Atlanta Coast Conference, Big  
16 Ten Conference, Big 12 Conference, Pac-12  
17 Conference, and the Southeastern Conference.

18 Q. Is the -- I'm calling it a veto,  
19 that may not be -- and correct me if that's not  
20 the right term, I'm analogizing it to the  
21 legislative process -- is there the ability for  
22 a veto override?

23 MR. KOWALSKI: Objection to form.

24 A. It's now a rescision process. Yes,  
25 for a bylaw provision that's adopted by the

1 council, and I don't think you can get there  
2 from either the constitutional provisions or  
3 the autonomy provisions because those actually  
4 involve a vote of all of the members at the  
5 outset.

6 So I think the next step from there  
7 if somebody's adequately upset would be courts.

8 (Berst Exhibit Number 1 marked for  
9 identification.)

10 Q. Okay. I'm going to mark, it's just  
11 on the table, so I see it there and I'm going  
12 to reference it quickly. There's -- on the  
13 table right now is the Division I manual for  
14 2011/'12. I'll mark that as Berst 1. I'm not  
15 sure we're going to get to the point we're ever  
16 going to actually look at it, but it's here so  
17 I thought of something to ask.

18 MR. KOWALSKI: And obviously, if you  
19 ever want to look at it --

20 MR. HAVERSTICK: Yeah.

21 A. And let me say that everything I  
22 just told you would be in NCAA '13/'14. So  
23 everything in '11/'12 will be different than  
24 what I just said.

25 Q. Okay. So we'll mark it. We may not

1 use it. All right. That was going to be one  
2 of my questions. '11/'12 is no longer current?

3 A. It's only current for --

4 Q. That year?

5 A. -- the period it indicates, and  
6 there are adjustments that you'll see in gray  
7 shades each year.

8 Q. Okay.

9 A. And that's the change from the year  
10 before.

11 Q. In general, is the Division I manual  
12 where one would go as the resource to find any  
13 NCAA Division I bylaw, rule, regulation, et  
14 cetera?

15 MR. KOWALSKI: Objection to form.

16 A. The -- I would say the online manual  
17 is the one that controls because it's always  
18 up-to-date. It simply depends on the question  
19 whether you go there or probably your first  
20 stop would be with individuals on the staff who  
21 provide interpretations.

22 Q. I don't think I asked the question  
23 correctly. What I'm driving at is are there  
24 sources of jurisprudence that control NCAA life  
25 outside of -- and I'm touching Berst 1 here --

1 outside of the manual, whether it's online or  
2 the paper version? And assuming it's the  
3 up-to-date version.

4 MR. KOWALSKI: Object to form.

5 A. And I don't know what you mean by  
6 your question. Are there areas of  
7 jurisprudence? What are you saying?

8 Q. If I wanted to exhaust the universe  
9 of rules and regulations applicable to NCAA  
10 Division I life, are there sources outside of  
11 Division I manual that I would need to  
12 reference?

13 MR. KOWALSKI: Objection.

14 A. There would be numerous of those.  
15 There would be all of the rules books, for  
16 example. This says follow the rules books, and  
17 you have another place to go find out football  
18 fields are a hundred yards long.

19 Q. Okay.

20 A. You have health and safety issues  
21 and procedures that are put in place or are  
22 required, and you wouldn't have all of those  
23 set forth in there. You would have a series of  
24 policies adopted by the executive committee.  
25 For example, there are association-wide issues

1 that you wouldn't find in the NCAA manual but  
2 are controlling because in their duties, they  
3 have the authority to pass policies that affect  
4 association-wide issues.

5 You have a whole set of policies  
6 adopted by the board of directors that would  
7 relate to advertising, you know, maybe even the  
8 price of a final four ticket or something that  
9 you wouldn't find there. So there are a lot of  
10 other sources to go to.

11 Q. Are those other sources external to  
12 the Division I manual referenced in the  
13 Division I manual somewhere, to your knowledge?

14 A. In some fashion, yes.

15 Q. So by studying the Division I  
16 manual, if I needed to learn a particular rule,  
17 even if the rule itself wasn't in the manual,  
18 likely I would find a reference to a document  
19 that I could go get from NCAA?

20 MR. KOWALSKI: Objection to form.

21 A. I think that's right. I think you  
22 would be able to find authority or information  
23 that would lead you to that information.

24 Q. Okay.

25 A. And you also have then staff

1 resources to help you identify where those  
2 would be as well.

3 Q. Who -- do you have a direct-line  
4 report?

5 A. Yes.

6 Q. Both up and down?

7 A. Up to Donald Remy. Down to Jackie  
8 Campbell, who's the director of Division I.

9 Q. You report to Mr. Remy in his role  
10 as general counsel or in his role as executive  
11 vice president?

12 A. As executive vice president for law,  
13 policy, and governance. So the governance  
14 piece of that would involve me.

15 Q. Okay. That answered my question.  
16 He has separate roles depending on what issue  
17 we have to be --

18 A. I agree with that, yes.

19 MR. KOWALSKI: Objection to form.

20 Q. And in your -- fair to say that in  
21 your normal interaction with Mr. Remy in the  
22 chain of command or the hierarchy, you're  
23 interacting with him in his capacity as having  
24 oversight of governance issues as opposed to  
25 his general counsel or chief counsel role?

1 MR. KOWALSKI: Objection to form.

2 A. I wish that were the case. You  
3 know, this is probably only the fifth  
4 deposition in the last couple of months. So as  
5 you can imagine, I deal with Donald on a whole  
6 host of matters related to the impact on  
7 Division I and various areas. So you'll have  
8 to work it how I distinguish those.

9 Q. I get that. You're not reporting up  
10 to him, though, in a legal capacity?

11 A. I am not, no. Well, I guess the  
12 answer to that is no. I'm not a lawyer. I  
13 have opinions often that I'll share.

14 Q. I'd love to hear them.

15 A. Well, you may.

16 Q. I might. I hope I do.

17 MR. KOWALSKI: Just so the record is  
18 clear, I assume you've been reporting to  
19 Donald in that capacity since he became  
20 executive vice president of corporate -- of  
21 policy, law, and governance?

22 A. Yes. Prior to that, I reported to  
23 Bernard Franklin. I don't know what the timing  
24 is of these issues but ...

25 Q. Let's get into that. By the way,

1 when you were in enforcement, to whom did you  
2 report up to in enforcement?

3 A. I reported to the executive  
4 directors only, so that would have been Walter  
5 Byers, Dick Shultz, Ced Dempsey, and then I got  
6 out of enforcement at that point.

7 Q. Does enforcement -- I know the names  
8 are going to be different, but does  
9 enforcement, the head of enforcement have a  
10 similar reporting up structure now, if you  
11 know?

12 A. I believe they reported to Jim Isch  
13 who would have been an executive vice president  
14 is my understanding.

15 Q. Is enforcement out of your direct  
16 chain of command or structure? They don't  
17 report up to you?

18 A. They do not. And I've intentionally  
19 in 15 years tried to distance myself as much as  
20 I can, although someone will come to me and ask  
21 about a procedural issue from time to time.

22 Q. Is that because you have been, as a  
23 long-tenured NCAA employee -- let me ask, no,  
24 that's the wrong way I want to ask it.

25 You acknowledge that you are a

1 long-tenured NCAA employee?

2 A. Yes.

3 MR. KOWALSKI: Objection to form.

4 Q. You have presumably a wealth of  
5 institutional knowledge that I imagine a lot of  
6 folks there don't have?

7 A. I would be so bold as to say that,  
8 yes.

9 Q. Do you have in your belief a -- this  
10 will draw an objection -- a formidable  
11 knowledge of the NCAA bylaws and regulations?

12 MR. KOWALSKI: I don't want to  
13 disappoint, so objection.

14 Q. It's a compliment.

15 MR. KOWALSKI: And I'm not objecting  
16 to the compliment.

17 A. I would say in the last 15 years, I  
18 would not have followed as carefully all of the  
19 changes for the first however many years I  
20 wrote many of the things that are contained.

21 So I still have quite a bit of  
22 knowledge. But, you know, I could -- you could  
23 catch me on some phrase or change that has  
24 occurred that I missed.

25 Q. That was going to be one of my

1 questions. Many of the rules and policies and  
2 bylaws still in force were ones that you wrote?

3 A. Yes.

4 Q. And if we ever have had to, you  
5 could identify for us which ones you wrote?

6 A. Yes.

7 Q. Fair to say that for the ones you  
8 didn't write, you had at least some level of  
9 input on?

10 A. No, not in all instances.

11 Q. Okay.

12 A. I'm sometimes aware of changes, but  
13 not that I participated in.

14 Q. Is your institutional knowledge, if  
15 you know, the reason that -- I know we're  
16 skipping ahead, so I'll ask the question and we  
17 can go back to where I was.

18 Is your institutional knowledge the  
19 reason, if you know, that you were included in  
20 conversations and negotiations with Gene  
21 Marsh --

22 MR. KOWALSKI: Objection to form.

23 Q. -- regarding the consent decree?

24 A. That was my intention. I attempted  
25 to insert myself in the process at that point,

1 and I believe that my view that I could be of  
2 assistance at that point was accepted.

3 Q. We'll talk -- thank you for that.  
4 And we'll talk about that. I'm trying to keep  
5 a logical progression because otherwise I'll  
6 fly off my axis, and we'll be here all day and  
7 none of us want that.

8 Let me direct your attention to late  
9 2011, and naturally we're now going to talk  
10 about Penn State and Jerry Sandusky.

11 When did you come to learn about the  
12 Jerry Sandusky issue at Penn State?

13 A. I'll have trouble with times, dates,  
14 and those kinds of things. My impression and  
15 my recollection now is just like everyone else,  
16 you know, based on news accounts related to it  
17 and just almost being inundated by articles and  
18 comments and commentary.

19 Q. Do you recall whether anyone in  
20 particular at NCAA alerted you to the issue?

21 A. At that point, no, I don't believe  
22 so.

23 Q. As we sit here today, you recall  
24 that -- if I tell you that Jerry Sandusky was  
25 charged in early November 2011, you'd agree

1 with me or have no reason to think I'm fooling  
2 you, at least?

3 A. I'm willing to accept your timeline.

4 Q. Okay.

5 A. I can't do any better.

6 Q. That's fine. Yeah, not a trick.

7 So if we accept that it was early  
8 November 2011 when Jerry Sandusky was charged  
9 criminally, would that be about when you think  
10 you learned of the issues?

11 A. Whenever all of the major newspapers  
12 and others began to cover it, I'd be, yes, I  
13 would know about it.

14 Q. Now, as specifically as you can  
15 recall, and I can show you documents to help if  
16 we think it would help, what was -- what were  
17 the action steps inside NCAA once the  
18 institution became aware of this issue?

19 A. I don't know the answer to that.

20 Q. Do you know the answer with respect  
21 to your involvement in any particular meetings,  
22 discussions, et cetera?

23 A. Yeah, I was invited to a meeting of  
24 the, at least, vice presidents or what we  
25 probably would have called presidents' cabinet

1 at the time sometime in November, and I believe  
2 that's the first I knew I was going to be  
3 involved in some conversation.

4 Q. If I told you that there was -- and  
5 by the way, for any of these things that I'm  
6 looking at right now, if you'd like to see them  
7 to help refresh your memory --

8 A. I will.

9 MR. HAVERSTICK: Well, let's do  
10 this. Why don't we mark Tab 6 as Berst 2.  
11 I'm wrong. I'm wrong. Tab 5 as Berst 2.  
12 I apologize.

13 (Berst Exhibit Number 2 marked for  
14 identification.)

15 Q. Now, what I've handed you is an  
16 email from Mark Emmert to Diane Young. You are  
17 carbon copied on this email, along with a few  
18 other folks, and it regards a meeting that  
19 Dr. Emmert desires to have on November 16th,  
20 2011, to discuss Penn State. And that's a  
21 paraphrase.

22 Does this email jog your memory  
23 about when you may have had a first meeting  
24 with folks?

25 A. No, it doesn't. I mean, I assume

1 it's going to be when they say they're going to  
2 set it up. What I said before was I got  
3 invited to a meeting, so this is the beginning  
4 of that invitation, apparently.

5 Q. Okay. Do you recall specifically or  
6 generally, I'll take either one, what was  
7 discussed at the first meeting you had on the  
8 Penn State issue?

9 MR. KOWALSKI: And you can answer  
10 the question. But in doing so, please  
11 don't reveal any privileged communications  
12 with legal counsel that may have occurred  
13 during that meeting.

14 A. To me, that meeting was an effort by  
15 Mark Emmert to begin to think through what the  
16 appropriate response of the NCAA would be to  
17 the Penn State matter, which according to at  
18 least published reports, was -- seemed to be as  
19 serious a matter as he could conjure up at  
20 least involving athletic personnel. And he was  
21 trying to determine what the appropriate  
22 response and/or process should be for him to  
23 move forward.

24 Q. Do you recall if Dr. Emmert at this  
25 meeting or thereabouts characterized this issue

1 as one for NCAA's enforcement processes to get  
2 involved in?

3 MR. KOWALSKI: Objection to form.

4 A. The -- and I don't know whether -- I  
5 can't remember how many meetings there were, if  
6 there was one or if it were two. There must  
7 have been a couple right around that same time.  
8 But certainly one of the considerations was,  
9 from his perspective, whether the enforcement  
10 program ought to be employed to become involved  
11 in this matter.

12 Q. Is it accurate to say that early on,  
13 Dr. Emmert advocated a role for NCAA in taking  
14 action with respect to Penn State?

15 MR. KOWALSKI: Objection to form.

16 A. From my perspective, he believed  
17 that the NCAA had to be responsive in some  
18 manner to the Penn State matter. We were being  
19 inundated by both information and probably  
20 individuals saying the NCAA has to act in some  
21 fashion.

22 Q. Was it your view in November of 2011  
23 that NCAA had to act?

24 MR. KOWALSKI: Objection to form.

25 A. No, it was not.

1 Q. Could you explain?

2 A. Well, the -- at that juncture,  
3 the -- there were, you know, a variety of  
4 possible ways to react. But I was opposed to  
5 the notion that the enforcement program should  
6 become involved. I believed that our processes  
7 were such that if you were to attempt to  
8 address Penn State through the normal  
9 enforcement process that involves the things I  
10 described before, direct interviews and  
11 information, which I thought would be obviously  
12 complicated and prohibited for a period of time  
13 because of, you know, potential criminal  
14 actions and matters and the fact that I was  
15 trying to identify appropriate bylaws that  
16 might come into play, institutional control was  
17 discussed, as well as the overarching  
18 principles of integrity and conduct of  
19 intercollegiate athletics programs, I did not  
20 believe that was the most appropriate way to  
21 try to move this forward.

22 Q. What did you believe was the most  
23 appropriate way to move it forward?

24 MR. KOWALSKI: At this time?

25 MR. HAVERSTICK: Sure.

1           A.       I don't know that at that time I  
2 articulated what my own view was. I think I  
3 simply objected to the notion that the  
4 enforcement program was a viable option at that  
5 point.

6           Q.       Is that because your belief at the  
7 time was that the enforcement process did not  
8 have, for lack of a better term, jurisdiction  
9 over this matter?

10           MR. KOWALSKI: Objection to form.

11           A.       I have some trouble using the word  
12 jurisdiction because in a technical sense, the  
13 response back to me on those kinds of issues  
14 was that, of course, there's jurisdiction.  
15 There's certainly potential jurisdiction under  
16 the rules that I've already made reference to,  
17 whether it's the constitutional provision or  
18 institutional control.

19                    I had not -- I had chosen at least  
20 over the years not to process through the  
21 infractions process something quite the way it  
22 was being described. I -- so I expressed  
23 adamantly that I didn't think that was the way  
24 to go. I think, in fact, I probably was the  
25 only one who spoke in such negative terms. I

1 know Julie also pointed out the practical  
2 issues that you would encounter if you were to  
3 take it that way, but I was much more direct on  
4 those points.

5 I can't say that it had no  
6 jurisdiction. I just hadn't done it that way  
7 and didn't believe that was appropriate.

8 Q. Couple follow-up questions from  
9 that.

10 Did you view this as a criminal, not  
11 an athletic matter, at least initially?

12 MR. KOWALSKI: Objection to form.

13 A. Well, the starting point was, for  
14 me, that -- and often in other cases that I was  
15 familiar with before that I might have  
16 encountered, you have a criminal issue and we  
17 all ought to cooperate as best we can with the  
18 criminal processes and assure that there might  
19 be, you know, appropriate actions taken by  
20 them. But we needed to let those take place  
21 before assessing whether there was something  
22 else, and if we were to investigate, probably  
23 investigate other things that might apply to  
24 such a case other than this so-called  
25 pedophilia.

1           Now, what I was not willing to give  
2 full credit to and part of the response back  
3 was that this is so heinous and so undermines  
4 general intercollegiate athletics generally,  
5 that it impacts the whole association. It's  
6 not something that just occurred as a criminal  
7 act involving an individual and even where an  
8 institution may have been seen as not  
9 adequately resolving or addressing that unique  
10 situation, this was one where through the  
11 actions and inactions of not only athletics  
12 personnel but maybe even administrators, you  
13 had a sanctuary for a pedophile to do what that  
14 person did, and that is bigger than just a pure  
15 institutional control kind of issue.

16           In fact, it simply undermines the  
17 athletics because you have a program  
18 potentially that has such unconditional support  
19 by a culture of people that would permit this  
20 kind of thing to go on unabated, and I could  
21 see that as a larger issue. And so I was  
22 willing to accept that you could address these  
23 kinds of issues if, in fact, you want to take  
24 that issue on.

25           If you have empowered athletic

1 programs that are too big to fail from the  
2 institution's perspective, and is the tail  
3 wagging the dog? And this was a way to get at  
4 that culture and change it, go for it. I guess  
5 you could do that. I wasn't in on believing  
6 that was the appropriate way to get at it.

7 Q. Do you believe that today, that the  
8 NCAA appropriately should be regulating the  
9 bigger institutional issues that don't  
10 necessarily involve athletics?

11 MR. KOWALSKI: Objection to form.

12 A. I sincerely wish that were the case.  
13 I would say that we have not been successful in  
14 demonstrating or even gaining support for  
15 attacking that further. This was a start in  
16 that direction. And if it had been more  
17 successful in shifting the culture at Penn  
18 State, then I would have been in on helping to  
19 develop additional rules actually that more  
20 explicitly would say that that's an appropriate  
21 function and duty of the association.

22 And I think most of America would  
23 agree with that.

24 Q. Do you -- as I heard your answer, is  
25 it your view that this effort was not

1 successful in accomplishing those goals and,  
2 therefore, it's, in your view, not an area that  
3 at this time NCAA should be pursuing absent  
4 some change in the bylaw structure?

5 MR. KOWALSKI: Well, objection to  
6 form. I mean, he said what he said.

7 MR. HAVERSTICK: I know.

8 Q. But you can answer. This is a  
9 philosophy board.

10 MR. KOWALSKI: It's a deposition.

11 But go ahead.

12 A. I, so far, have not been able to  
13 identify adequate support for the national  
14 organization taking on that kind of a role more  
15 generally. And so, you know, I don't -- at  
16 this point, don't see that developing. I  
17 haven't seen any drafts of additional  
18 legislation that would head in that direction.

19 As to whether this was successful,  
20 you know, I see the -- what I hope is a  
21 minority view from plaintiffs' attorneys and  
22 other very vocal individuals around Penn State  
23 who simply are defending the previous culture  
24 and saying, NCAA, you shouldn't have ever done  
25 anything. You should not attack our program

1 which is supported unconditionally. I think  
2 that's just wrong footed, and I believe -- I  
3 hope there's actually a majority of the people  
4 in the valley who are thinking this is the  
5 dumbest thing I've ever seen, and everybody  
6 ought to be moving forward, and what Erickson  
7 did was give everybody a chance to do that in  
8 moving forward.

9           And there have been what I hope is a  
10 minority group that simply won't accept that  
11 which, in my mind, is proof of the problem with  
12 the culture in the first place because I don't  
13 ascribe proper motivations to the people who  
14 are involved in this case, but I think there  
15 were a whole lot of other unsuspecting and just  
16 good people, sports fans, who accepted anything  
17 that was said by Joe Paterno as the answer to  
18 any question. And I knew Joe and understand  
19 how that viewpoint could take place. But the  
20 failure is in the failure to act appropriately  
21 when the time came for that to occur.

22           So that had to change in some  
23 fashion. I believe Mark Emmert did the right  
24 thing to try. Even though I disagreed with the  
25 process in the beginning, I would testify, and

1 am, that it had full -- he had full authority  
2 to try to start enforcement process that the  
3 executive committee had full authority to act  
4 under matters that are fundamental to the  
5 association.

6 And that brings us to here today,  
7 unfortunately.

8 Q. Given your institutional knowledge,  
9 is it your view that new rules or bylaws would  
10 have to be adopted for NCAA to undertake a  
11 process a second time to deal with -- to  
12 undertake a process similar to the one that it  
13 did with Penn State to encompass all of those  
14 broader issues? In other words, are the rules  
15 structured right now --

16 A. I get the question.

17 Q. Yeah, I'm not --

18 MR. KOWALSKI: I object to form.

19 A. Well, no. The executive committee  
20 does have the authority to do it. They could  
21 do it again tomorrow. I think the issue for  
22 the executive committee is whether there is  
23 broader support, broad support within the  
24 membership to attempt to do that. And were  
25 that to be an initiative to be undertaken, I

1 would want to write some additional language  
2 and legislation to clarify and make more direct  
3 that authority so that I -- so I know that  
4 there's membership support for it.

5 But the executive committee had full  
6 authority, and I think they could do it again.

7 Q. You would, if you controlled that  
8 process, write legislation that would make more  
9 explicit the authority to do what was done in  
10 Penn State's case; is that a fair summation of  
11 what you said?

12 MR. KOWALSKI: Object to form.

13 A. I don't want to agree to whether  
14 something has to be more explicit or not  
15 because I don't think so. But I would want to,  
16 you know, try to develop more language around  
17 what an out-of-control athletics culture is and  
18 how it becomes too big and overwhelms the  
19 academic mission of the institution and the  
20 integrity of intercollegiate athletics. So I'd  
21 try to develop more language to help in that  
22 regard. Probably make it broader than just  
23 this unprecedented issue that I don't think  
24 anyone in America could say should have gone  
25 on.

1 Q. When you expressed your views early  
2 on about the reaction from NCAA, I heard you  
3 testify that you were a minority, maybe a  
4 minority of one; is that right?

5 A. I said that I think I was the only  
6 one who really spoke out vocally and directly.

7 Q. Were there others who felt as you  
8 did but were not as vocal?

9 MR. KOWALSKI: Objection.

10 A. The only person that spoke in the  
11 meeting that I recall that was really in  
12 response to how would you do this if we sent  
13 your investigators out was Julie Roe. I don't  
14 recall anyone else actually speaking up and  
15 saying we can't, we shouldn't do this.

16 Q. Did anyone privately say that to  
17 you?

18 MR. KOWALSKI: Objection.

19 A. I don't know. I can't recall  
20 talking about this with others. I don't think  
21 so.

22 Q. Do you recall talking to anyone  
23 outside of NCAA's structure about these issues  
24 and expressing any concerns?

25 A. Well, sure. I don't mind -- I mean,

1 it's never been a secret. So anybody I've  
2 talked to about these, I would have said I  
3 thought it was not the way to go in the  
4 beginning, and I'm now convinced and will  
5 testify. I mean, I know this stuff better than  
6 most and can say unequivocally that the  
7 eligibility committee had authority to do this.

8 But, yes. Anyone who would have  
9 asked me would have probably heard some  
10 reference to me not being onboard in the  
11 beginning.

12 Q. We may get back to that later on.  
13 There was a rebuttal to your  
14 expressed view, correct?

15 A. Well, there were lots of rebuttals.  
16 But I think the overarching view of Mark Emmert  
17 was that he needed to attempt to pursue this  
18 matter further, that there were integrity  
19 issues at stake with the association on this  
20 matter.

21 Q. Was Mark Emmert the lead voice in  
22 rebuttal to your concerns?

23 MR. KOWALSKI: I just caution you  
24 not to reveal any privileged communications  
25 about these meetings.

1           A.     Yeah, I think -- well, in that  
2 regard, I think I have to limit it to Mark.

3           Q.     That's fine.

4                     I can ask it this way: Setting  
5 aside --

6           A.     I would say to you that didn't  
7 persuade me. I think I know as much about this  
8 or more than anyone who was in the room. So  
9 there were rebuttals that came.

10          Q.     I'm asking whether, in your view,  
11 Mark Emmert was the lead most vocal, most  
12 strident proponent of no, we need to plot, we  
13 need to move forward?

14          A.     He was the proponent of it is  
15 essential that we find a way to address this  
16 issue.

17          Q.     And he viewed that as a matter of  
18 the NCAA's ability to be a real regulatory  
19 force, is that what you were saying?

20                     MR. KOWALSKI: Objection to form.

21          Q.     You can answer.

22                     MR. KOWALSKI: Sure. But he already  
23 did. He can do it again.

24          A.     I think it was framed in the -- in a  
25 manner to indicate that there was sufficient

1 outrage and concern around the country that it  
2 was imperative for the NCAA to evaluate every  
3 possible avenue to address this issue.

4 Q. Now, am I right that the backdrop of  
5 these early conversations were media reports,  
6 inquiries asking what is the NCAA going to do  
7 about this?

8 MR. KOWALSKI: Objection to form.

9 A. I don't know the full scope of  
10 information available. For me, it was the  
11 public reports. So I knew of those and I had  
12 seen them. But I don't know anything about  
13 other conversations that may have taken place  
14 or calls that others may have received about  
15 it. I don't recall people calling me saying  
16 anything. I think I was just reading it.

17 Q. If you know, in expressing his  
18 views, did Dr. Emmert indicate that the image  
19 of NCAA could be tarnished somehow if it did  
20 not act in this case?

21 MR. KOWALSKI: Objection to form.

22 A. The -- I would object to the way you  
23 put it. I think he thought it important for  
24 the NCAA to demonstrate that it has the ability  
25 to address this kind of matter.

1 Q. I want to ask, I suppose, a related  
2 question. At about this time, was NCAA in the  
3 process of rewriting many of its regulations  
4 and bylaws, including on enforcement and  
5 including on infractions?

6 MR. KOWALSKI: Objection to form.

7 A. At this juncture, it had followed a  
8 presidential retreat, and there were several  
9 working groups that were -- that had various  
10 assignments. One was on enforcement related  
11 to, you know, re-categorizing the levels of  
12 violations to make more clear how -- or how  
13 serious particular breaches of NCAA rules might  
14 be considered.

15 There was also an effort to  
16 so-called deregulate or shift some of the  
17 responsibility for interpreting how to apply  
18 NCAA rules back to institutions and conferences  
19 from the national organization, so there was  
20 sort of a decentralizing effort among the  
21 committee. But those were very preliminary at  
22 this point. When these meetings took place, we  
23 were 2 months following the -- no, not 2  
24 months, August to -- we were closing in on 4 or  
25 5 months since that retreat had taken place.

1 MR. KOWALSKI: Matt, if we're going  
2 to go into the working group stuff for a  
3 while, let us know when we can take a break  
4 in the next few minutes. We've been going  
5 over an hour. Just want to take a bathroom  
6 break.

7 MR. HAVERSTICK: Yeah, that's fine.  
8 Is that convenient for you?

9 THE WITNESS: That's fine.

10 (A short break was had.)

11 MR. HAVERSTICK: Back on the record.

12 Q. I'd like to ask a couple of  
13 questions about the presidential retreat that  
14 you mentioned. That happened in --

15 A. August of 2011.

16 Q. Okay.

17 A. Maybe 9, 10. 10 was one of the  
18 days. I'm not sure which it is.

19 Q. If I'm capturing this correctly, as  
20 a result of, at least in part, that retreat,  
21 there were then efforts to revise or draft new  
22 legislation policies, et cetera?

23 A. Well, there were several initiatives  
24 that resulted in, I think, five working groups  
25 being established of presidents on various

1 subjects for follow-up. So one of those was an  
2 effort to evaluate the NCAA manual and figure  
3 out how many pages we could take out of the one  
4 you touched earlier and either reassign  
5 responsibility for those rules to institution's  
6 autonomy or conferences and otherwise simplify  
7 the manual.

8 Q. What were the other four initiatives  
9 that came out of the --

10 A. You know, I knew you were going to  
11 ask me that. One was student athlete  
12 well-being. One was what we just mentioned,  
13 the rules working group. One was related to  
14 use of the resources.

15 I think there was one related to  
16 academics as well that had been assigned  
17 primarily to an existing group. And another  
18 one, which I don't recall off the top of my  
19 head.

20 Q. Do you recall if it has anything  
21 apropos to anything that we're talking about  
22 today with respect to enforcement, sanctions,  
23 et cetera?

24 MR. KOWALSKI: Objection to form.

25 A. Oh, good point. The one I forget.

1 Yes, it was one that was to review both to  
2 clarify current NCAA processes and to rewrite,  
3 I think, the penalties in a manner that could  
4 be better understood than we had already made a  
5 shift from -- kind of going the long route --  
6 but secondary and major infractions and  
7 presumptive penalties, which I wrote all of, to  
8 a more simple list, I guess, of all of the same  
9 penalties but without those kinds of words so  
10 nobody got confused about what's presumptive  
11 mean.

12 And then into levels, four levels of  
13 penalties and characterization of violations  
14 that could be set forth in Level 1, 2, 3, or 4  
15 that would have something like a schedule of  
16 penalties that might apply to those kinds of  
17 matters.

18 Q. Who had responsibility following the  
19 presidential session to work on that rewrite?

20 A. There -- I don't recall all of the  
21 members of the committee. Ed Ray who was the  
22 president at Oregon State and chair, I think,  
23 of the executive committee at the time when it  
24 started, and Julie Roe was the liaison to that  
25 group, Robin Green-Harris who had been a

1 previous staff member of mine in governance and  
2 who also had been a previous staff member for  
3 the committee on infractions at the NCAA, Lou  
4 Anna Simon who's president at Michigan State  
5 University, and then I'm lost.

6 Q. Was a policy goal underlying these  
7 rewrites? I'm talking about only this fifth  
8 category, in part, that NCAA wanted to provide  
9 clarity in the rules?

10 A. You're talking about enforcement?

11 Q. Correct. The last category that  
12 we're talking about that Lou Anna Simon was  
13 working on and those rules rewrites, tiering or  
14 bracketing, or however you described it.

15 A. I don't know that I know the charge.  
16 There was a charge to the group, and I'm sure  
17 Julie would know chapter and verse of what it  
18 was that it was to do.

19 I attended some of the meetings, but  
20 I would guess -- I'm not sure of that because I  
21 think they ended up eliminating bylaw 32 at  
22 some point in that exercise. I don't know if  
23 that clarifies or not.

24 Q. What's bylaw 32?

25 A. It was the investigative practices

1 and policies.

2 Q. Do you know why that bylaw was  
3 eliminated?

4 A. No. It will be clear in their  
5 reports, but no, I don't know.

6 Q. And you said that you were in some  
7 of the meetings or where, I suppose, the  
8 impetus of some of the ideas for why there  
9 would be rewrites for this particular section  
10 was broached?

11 A. Yes, I was present.

12 Q. Was a theme for why rewrites, again  
13 in this category, necessary in part that NCAA  
14 wanted to be firmer or more strict or otherwise  
15 be viewed as a more potent enforcer --

16 MR. KOWALSKI: Objection.

17 Q. -- in the realm of college  
18 athletics?

19 MR. KOWALSKI: Objection to form.

20 A. I'd have to defer to Julie on that.  
21 I don't know what the precise thinking was. To  
22 me, the categorizations of penalties seemed  
23 clearer, but I don't know what that necessarily  
24 demonstrated over what the view of enforcement  
25 was prior to that.

1 Q. I'm asking whether in any of these  
2 working group sessions, anyone ever articulated  
3 a sentiment such as, we should do this rewrite  
4 because this will reinvigorate our rules and  
5 sanctions process or will make it tougher, or  
6 something that suggested the rewrite was  
7 necessary to make NCAA a more potent enforcer?  
8 And I'm obviously characterizing it, this would  
9 have been my language, but I wanted to know if  
10 anybody ever expressed that sentiment even  
11 informally in these working sessions for why  
12 you might want to rewrite these rules?

13 MR. KOWALSKI: Objection to form.

14 A. And I can't answer you. I just have  
15 to speculate on that. I didn't attend all, I  
16 attended some of those meetings. And the NCAA  
17 enforcement program has always been considered  
18 potent. I was considered potent when I would  
19 have told you I wasn't potent. So the  
20 initiatives in enforcement are always intended  
21 to provide clarity and some renewed confidence  
22 in the program. But how that manifests itself  
23 or what people said, I don't know.

24 Q. The testimony you just gave, was  
25 that your speculation for why these particular

1 rules were being rewritten? If not, I'd ask  
2 you to speculate.

3 MR. KOWALSKI: Objection to form.

4 A. Yeah, and I really would be  
5 speculating.

6 Q. That's okay.

7 A. I'm trying to tell you I don't know.

8 Q. That's okay. I'm interested in  
9 speculation too.

10 A. Well, I'm not going to go that far.  
11 I'll give you some impressions here and there,  
12 but I don't want to just guess.

13 Q. How about your impression? Was it  
14 your impression that one policy rationale  
15 behind the rewrite of these rules was to  
16 articulate firmer, tougher rules for member  
17 institutions?

18 MR. KOWALSKI: Object to form.

19 If you have an impression.

20 Q. Yeah, if you do.

21 A. I don't have that impression. I saw  
22 rules that were articulated in different forms,  
23 but I didn't say anything that provided new  
24 penalties or areas where somehow the NCAA could  
25 do something different than now it can do.

1 They have the same penalties and have had for  
2 50 years.

3 Q. Was there any impression or  
4 sentiment among your colleagues that NCAA was  
5 viewed by the outside world as a less than  
6 tough enforcer of rules in college athletics?

7 MR. KOWALSKI: Is this at the  
8 retreats or ever, generally?

9 Q. In life, in life.

10 A. I've seen Jim Delany from the Big  
11 Ten quoted in that regard. I've seen Bob  
12 Bowsby quoted along those lines more recently.  
13 That's probably post Penn State kinds of  
14 issues. I also have seen some writings by John  
15 Duncan about what the actual facts would  
16 indicate which seem to me to show that  
17 enforcements continue to be viable, effective  
18 and a worthy service to our membership.

19 So I can't -- I don't have whatever  
20 you're asking me for.

21 Q. Well, I'm not sure anybody does.  
22 Here's one that you may or --

23 MR. KOWALSKI: Then objection.

24 Q. If you know, did Dr. Emmert have any  
25 concern that there was a perception among folks

1 like Jim Delany that perhaps the NCAA was not  
2 the enforcer it should be?

3 MR. KOWALSKI: Objection.

4 A. I don't have any way of trying to  
5 think through what Mark Emmert had in his mind.  
6 I believe he, like everyone else, believes that  
7 the NCAA enforcement program needs to be  
8 viable, efficient, and have credibility. And I  
9 think that's an important principle.

10 Q. Let's move ahead to -- back to the  
11 early November meetings that we were discussing  
12 before.

13 And I think we established that Mark  
14 Emmert was perhaps a lead voice in pushing back  
15 against your suggestion that let's think about  
16 whether we have jurisdiction or whatever word  
17 we're using.

18 MR. KOWALSKI: Objection to form.

19 A. Yeah, and I never said to you that  
20 we didn't have jurisdiction. I said I objected  
21 to the manner by which they may want to move  
22 forward in the enforcement program at that  
23 time. But the -- if where you're going with  
24 that is somehow is this because the NCAA needed  
25 to look tougher? I take it that's where you're

1 trying to go, and that wasn't my impression.

2 My impression was that there was a  
3 demand from the public, from virtually  
4 everybody. And I can't think of any single  
5 source that didn't say the NCAA needs to be  
6 able to react to this kind of a matter that it  
7 undermines intercollegiate athletics, period.  
8 And I think he was impacted by that and  
9 believed that the association needed to attempt  
10 to process this matter forward.

11 Q. I actually wasn't asking you, but I  
12 do appreciate the answer because I think it is  
13 helpful in understanding what you-all were  
14 thinking about.

15 Mark Emmert, in other words,  
16 believed that NCAA needed to respond to this  
17 situation?

18 A. I believe so, yes.

19 Q. In Mark Emmert's early articulation  
20 of this notion, did he begin to inject into the  
21 discussion the concept of lack of institutional  
22 control as one that could lead to sanctions?

23 MR. KOWALSKI: Objection to form.

24 A. I don't recall. That's the obvious  
25 possibility, and I don't know whether I would

1 have said that or he would have said that or  
2 anyone thoughtful trying to think of ways. The  
3 only directions would be institutional control  
4 and/or -- and even more overarching principle  
5 in constitution 2 possibly.

6 Q. And what is that principle? Tell  
7 me, please.

8 A. I'd have to paraphrase. But it  
9 relates to conducting programs with integrity  
10 and fairness and compliance with NCAA rules.

11 Q. If you -- is it accurate that what  
12 we're talking about is the idea that somebody  
13 articulated those principles as ones upon which  
14 sanctions or enforcement could be based, you're  
15 just not sure right now who it was that put it  
16 on the table?

17 A. Those items were at least part of  
18 the discussion, and I don't know where it came  
19 from.

20 Q. And early on? We're talking  
21 essentially in the very beginning of the  
22 conversations about how NCAA should react?

23 A. I don't recall precisely the order  
24 of meetings, and my guess is we had a couple  
25 around that time that included all of the

1 people you're making reference to. So I don't  
2 know which came first, but I'll put those two  
3 meetings together.

4 Q. For my purpose, it doesn't matter.  
5 I just want to make sure I'm hearing you right,  
6 that it was -- it wasn't later in 2012 that the  
7 idea of enforcement being tied to lack of  
8 institutional control or broader institutional  
9 issues came up as a possibility for how to move  
10 forward? It was really back in this early  
11 couple of meetings by somebody?

12 MR. KOWALSKI: Objection to form.

13 A. I believe that it was because the  
14 eventual letter that gets submitted to the  
15 school I think, in my recollection, makes  
16 reference to those rules.

17 Q. Let's -- let me ask you about that  
18 letter.

19 MR. HAVERSTICK: I'll tell you what,  
20 just so we have it, can we mark as Exhibit 3,  
21 Tab 9.

22 (Berst Exhibit Number 3 marked for  
23 identification.)

24 Q. There you go.

25 A. I've read it. I see it.

1 Q. Some questions about the top cover  
2 email. Who is Crissy Schluep? It's my German  
3 slipping out.

4 A. She was an assistant to the  
5 president and maybe others at that point. So  
6 she would have been passing this information  
7 along to the individuals who were next to the  
8 "To" and cc line.

9 Q. And you, in turn, receive the letter  
10 and forward it to three other folks: Greg  
11 Shaheen, is it Dennie "Pop" or "Poppy"?

12 A. "Pope."

13 Q. "Pope." Third time lucky. And  
14 Jackie Campbell. I know I can say that right.  
15 Who are those people?

16 A. Those are additional vice presidents  
17 and then my assistant in governance.

18 Q. Why did you chose to send it to  
19 those three people, if you remember?

20 A. I don't remember, but it would have  
21 been because they were missing in the first  
22 instance by Crissy, and they may well become  
23 aware of these issues. Greg Shaheen was  
24 involved in all of the championships area.  
25 Dennie Poppe was vice president related to

1 football and baseball and would have interacted  
2 with a number of folks at Penn State, and  
3 Jackie because she and I would be involved in  
4 anything that later pertained to governance.

5 Q. Turning to the letter itself, did  
6 you have any role in drafting this document?

7 A. I don't know. I don't believe so.

8 Q. Do you know who did, who wrote it?

9 A. I do not specifically.

10 Q. You --

11 A. It looks like Mark Emmert, the way  
12 the -- at the bottom, it has a couple of  
13 initials, and then DBY would be the person who  
14 typed it.

15 Q. He signed it. But if it was -- if  
16 there was input from other folks about the  
17 actual language, you don't today know of  
18 anybody else who might have participated in  
19 drafting the letter?

20 A. I don't recall me doing it, but I  
21 don't know who else might have.

22 Q. You told us in the beginning of our  
23 discussion today what a notice of inquiry  
24 letter looked like.

25

1 (Berst Exhibit Number 4 marked for  
2 identification.)

3 Q. Is this a notice of inquiry letter?

4 A. No. And that was my doing.

5 Q. Tell me, please. Tell me.

6 A. I said whoever follows up, if you're  
7 going to write a letter to Penn State, do not  
8 do it under enforcement, enforcement auspices.

9 Q. Why did you say that?

10 A. Because no one at that stage knew  
11 how this might be pursued. And while this is  
12 drafted and sent to Penn State to gather some  
13 information, in my view, that was just for the  
14 benefit of the president of the association to  
15 then begin to understand the case well enough  
16 to know where to refer it.

17 Q. You did not -- you did not at this  
18 time, November 17, 2011, believe that it was  
19 the right time to commence an enforcement  
20 action?

21 MR. KOWALSKI: Objection to form.

22 A. I did not believe that the  
23 enforcement mechanism -- I continued to believe  
24 at that time that the enforcement mechanism  
25 should not be used. And tried to make that

1 point and made the point that to the extent  
2 possible in follow-up, keep it independent of  
3 enforcement. If you want to employ enforcement  
4 later on, so be it. But I saw a number of  
5 cumbersome steps that had to take place if you  
6 were going to do that. And the more  
7 appropriate route in my view was to just  
8 collect information, figure out what you have,  
9 cite whatever you would like as references to  
10 the bylaws for information, but then once you  
11 receive the response, figure out what to do  
12 next.

13 Q. When did you learn roughly, we don't  
14 have to have mathematical precision, when did  
15 you learn roughly that this letter or a letter  
16 like this was going to be sent to Penn State?

17 A. I think all of the conversation  
18 we're talking about, it probably wasn't the  
19 first meeting, but I would guess second meeting  
20 in a day or two or even in the same period of  
21 time we ran through what people were thinking  
22 about and wherever someone said, well, we  
23 should inquire of the institution, I said, my  
24 response was to do it separate from  
25 enforcement. Do not have Julie Roe send this

1 thing out.

2 Q. Did anyone advocate for considering  
3 this to be an enforcement letter or letter sent  
4 out under the enforcement division's auspices?

5 MR. KOWALSKI: I object and caution  
6 you not to reveal the contents of any  
7 privileged communications involving Donald  
8 Remy or other NCAA legal counsel.

9 A. Well, as sometimes happens, I speak  
10 and give my opinions. And mostly everybody is  
11 nonresponsive. So I don't know --

12 Q. I get that too.

13 A. -- what other conversations took  
14 place. Nobody pushed back necessarily, but I  
15 had no idea whether they followed my advice.

16 Q. So without getting into any  
17 conversations with Donald Remy regarding legal  
18 advice, it's your recollection that no one was  
19 suggesting that we should send this under  
20 enforcement auspices; to the contrary, when the  
21 issue of a letter came up, you were saying, if  
22 you do it, don't do it under enforcement?

23 MR. KOWALSKI: Objection to form.

24 Go ahead.

25 A. I think someone would have said it

1 could go out from Julie, and it could if you  
2 were trying to pursue it in that manner. I  
3 don't know who said that, but I objected  
4 strenuously to that notion.

5 Q. So your recall is there may have  
6 been some effort to have this be some  
7 enforcement -- have this letter come under the  
8 auspices of enforcement but it was rejected  
9 after you rejected it?

10 MR. KOWALSKI: Objection to form.

11 A. No. And all of this discussion was  
12 what can we do? What should we do? What  
13 options are available?

14 Q. Okay.

15 A. So nobody was saying here's what's  
16 going to be done. And I gave my opinion to be  
17 considered by those who were going to make  
18 decisions. I wasn't one of those people, but I  
19 believe I know the processes better than anyone  
20 else and could at least keep them out of a  
21 little bit of trouble until we better assess  
22 what the circumstances of this matter is in  
23 order to properly consider further steps.

24 Q. What little bit of trouble did you  
25 think they might get into if they did this a

1 different way?

2 A. I was worried that attempting at the  
3 outset to put it in the enforcement realm would  
4 have all kinds of procedural restrictions that  
5 would make it very difficult that I mentioned  
6 earlier, like having interviewed directly the  
7 named individuals who were probably going to be  
8 involved in criminal activities, had lawyers  
9 who were going to say we're not going to talk  
10 to the NCAA until all of these things are over,  
11 which would mean nobody is going to get an  
12 answer to this letter for about 2 or 3 or 4 or  
13 5 years.

14 Q. So in part, your concern was based  
15 on the idea that invoking the enforcement  
16 process would make it less likely to get useful  
17 information from Penn State University?

18 MR. KOWALSKI: Objection to form.

19 A. Nope, I don't think that's what I  
20 said. What I was trying to find is a mechanism  
21 for the president of the association to gain  
22 further information about what actually  
23 occurred or what the circumstances were, what  
24 the positions were of the institution in order  
25 to determine how to process this further.

1           I did object to the notion that  
2 there should be a choice made to head this down  
3 the enforcement -- through the enforcement  
4 mechanism. I wanted to wait and see what the  
5 response was. And then if I could be of  
6 assistance in trying to move it along at that  
7 point, that was my intention.

8           Q.     At that point, your intention was  
9 to, once information had developed, move it  
10 towards the enforcement realm presuming that  
11 there was something to enforce?

12           MR. KOWALSKI:  Objection to form.

13           A.     No. My position was that I would  
14 assess the response and provide guidance based  
15 on what that response would be as to next  
16 steps. And I was trying to keep it separate  
17 from the enforcement program to leave all  
18 options open.

19           Q.     At this time, it is already being --  
20 at the time of the letter, rather, it is  
21 already being contemplated that NCAA will act  
22 or may act against Penn State, right?

23           MR. KOWALSKI:  Objection to form.

24           A.     I don't think I could go that far  
25 because I was still thinking that you may well

1 get responses back that you think are fine,  
2 appropriate, the institution is doing the right  
3 thing. I thought it's possible you could even  
4 conclude, I'll be supportive of what the  
5 institution is doing and one option could be go  
6 no further.

7 Q. I appreciate that answer. I really  
8 do, but I want to establish that I'm right up  
9 here, pointing to my head, with something.

10 In your early discussions in these  
11 meetings that we're talking about, there had  
12 been expressed I believe you said by Dr. Emmert  
13 the idea that the NCAA should act. Is that  
14 accurate?

15 A. It is. And I'll go ahead and answer  
16 the rest of that which is that one of those  
17 options would be to be supportive of an  
18 institution based on the information that's  
19 gathered. So those options include, thank you  
20 for the information. You've adequately  
21 addressed institutional control. We believe  
22 you're on the right track. Let's talk about  
23 what other actions you're going to take, and  
24 we'll do the best we can to support you in that  
25 realm.

1           One action could be to assign it to  
2 enforcement and ask enforcement to submit a  
3 letter of preliminary inquiry.

4           Another could be to send it to the  
5 executive committee and to have the executive  
6 committee consider the matter under its  
7 authority to act on association-wide matters.

8           And there's probably a fourth or  
9 something that's not even coming to mind, but  
10 all of those were possible options at that  
11 point.

12           Q.     Given that there was a possible  
13 option that enforcement could become  
14 involved --

15           A.     I just remembered the other.

16           Q.     Go ahead.

17           A.     The other one would be stipulated  
18 agreement that would lead you to a summary  
19 disposition process through enforcement. So  
20 there's a shortcut enforcement program  
21 opportunity as well.

22           Q.     Would that be kind of like a consent  
23 decree?

24           MR. KOWALSKI:  Objection to form.

25           A.     In a -- we'll get there eventually.

1 Q. I imagine.

2 A. But no, it isn't.

3 Q. They're different?

4 A. It only is consistent in the sense  
5 that you agree on stipulated findings. How you  
6 process it is different.

7 Q. But it's an agreement between the  
8 parties on what a disposition is for a case?

9 A. That's the first step, yeah.

10 Q. Well, let me get back to where I was  
11 heading with my original question along these  
12 lines.

13 Given that enforcement was a  
14 possibility as an outcome for what happened or  
15 what might result from the information you  
16 learned from this letter, in your experience at  
17 the NCAA, have you ever seen a letter like this  
18 go out where enforcement -- enforcement's  
19 involvement is possible down the road?

20 MR. KOWALSKI: Objection to form.

21 A. Yes. I think it's not unusual for  
22 correspondence to result later in some sort of  
23 an action by enforcement. That could have come  
24 from me in that role, simply asking the  
25 question out of curiosity when something would

1 come up. But it could come up from any  
2 correspondence from executive director or  
3 president, another vice president, two schools,  
4 you know, asking each other questions. Sure.

5 Q. Can you cite an example for me of a  
6 time where the president of the NCAA wrote to a  
7 member institution asking questions outside of  
8 the enforcement context but where the answers  
9 might lead to the enforcement context?

10 MR. KOWALSKI: Objection to form.

11 A. I don't know how -- I don't think I  
12 can off the top of my head, no.

13 Q. Okay.

14 A. I believe that such things have  
15 occurred, and I've even done it myself. But I  
16 can't -- I don't know that I can think back of  
17 how I started a case that way either.

18 Q. Were you --

19 A. I mean, in case files, you go to the  
20 very first document and that's where that  
21 answer would come from.

22 Q. So we could theoretically you  
23 believe that there are case files where rather  
24 than the notice of inquiry letter, there is  
25 some other letter that looks like this but

1 specific examples, off the top of your head,  
2 you don't recall?

3 MR. KOWALSKI: Objection to form.

4 A. You will have a whole host of cases  
5 that will start with combination of  
6 correspondence, articles, some allegations  
7 submitted by others, that that would be in the  
8 beginning of how you become aware of potential  
9 violations, and it would be short of filing  
10 that letter of preliminary inquiry that I  
11 indicated before.

12 Q. So this, you would not characterize  
13 this letter as unique or unprecedented?

14 MR. KOWALSKI: Objection to form.

15 A. No, I wouldn't.

16 Q. Okay. Flipping through, there are  
17 references to bylaws that may be implicated by  
18 the conduct associated with Jerry Sandusky and  
19 Penn State. Were you asked for input for  
20 purpose of this letter to denote any bylaws  
21 that you believed might be implicated by the  
22 conduct?

23 MR. KOWALSKI: Objection. Caution  
24 you not to reveal the contents of any  
25 privileged communications with Donald Remy

1 in answering the question.

2 A. I was not.

3 Q. Do you know who was?

4 MR. KOWALSKI: Same objection.

5 A. I do not.

6 Q. Do you recall seeing a draft of this  
7 letter before it was sent?

8 A. No, I don't.

9 Q. You weren't asked to review it  
10 before it went out?

11 A. I don't recall being asked.

12 Q. Would it --

13 A. It's not impossible, but I don't  
14 recall it.

15 Q. Nothing unusual about you not being  
16 asked to review a letter like this before it  
17 would go out?

18 A. No, there is nothing unusual about  
19 that.

20 Q. Okay.

21 A. I'm not necessarily in the --  
22 considered among the leadership that might make  
23 those decisions. I'm a vice president level,  
24 not a senior or a vice president -- senior or  
25 executive vice president.

1 Q. Who is in that leadership group?

2 A. Well, at this time, would have been  
3 Mark Emmert obviously, Wally Renfro, Jim Isch,  
4 Donald Remy, possibly Greg Shaheen.

5 Q. You don't have any knowledge of  
6 whether those individuals collaborated or  
7 reviewed this letter? We're just talking in  
8 general about who would be in the control  
9 group.

10 A. I do not. I don't know.

11 Q. After the letter was sent, were you  
12 ever asked or -- were you ever asked about the  
13 four questions that are on Pages 2 or 3?

14 MR. KOWALSKI: And caution you not  
15 to reveal the contents of privileged  
16 communications with legal counsel.

17 A. I don't recall that, no.

18 Q. Is it your understanding that NCAA  
19 desired answers to these questions before it  
20 would decide what steps it would take, be that  
21 enforcement, be that one of the other options  
22 that you testified to a few minutes ago?

23 MR. KOWALSKI: Objection to form.

24 A. Well, I would say to you that this  
25 was an attempt by Mark Emmert to collect

1 information to try and come to some conclusion  
2 or some decision on how or where to refer that  
3 information.

4 Q. I'll put a placeholder in here, I'll  
5 ask it later when we talk about Gene Marsh.  
6 I'm going to ask it now in case I forget.

7 Do you know if Penn State ever  
8 specifically answered these questions?

9 A. I don't recall that they did. I  
10 recall, I believe, that there was a request to  
11 at least answer them later because there were  
12 other processes that the university was  
13 involved in that they wanted to complete before  
14 being required to respond. I think the notion  
15 was that they would respond eventually. But I  
16 think that other events took place and rendered  
17 this, these -- this correspondence basically  
18 moot, I think.

19 Q. To your knowledge, these questions  
20 were not answered by Penn State prior to the  
21 consent decree's making?

22 MR. KOWALSKI: Objection to form.

23 A. That's at least my thinking,  
24 understanding. I mean, you could show me  
25 something to persuade me otherwise. But I

1 don't recall that it was.

2 Q. What would have happened to Penn  
3 State -- this is, I'm asking you to speculate,  
4 unless it was discussed, of course, what would  
5 have happened if Penn State simply refused to  
6 answer the letter?

7 MR. KOWALSKI: Objection to form.

8 Hypothetical.

9 A. Yeah, that is completely  
10 hypothetical. I thought at the time that that  
11 is a possible response that could come, but I  
12 didn't go any further with that speculation.

13 Q. Other than speculating that Penn  
14 State might not respond, you never speculated  
15 what NCAA's response could or should be?

16 A. I did not, no.

17 Q. Now, you testified that there are --  
18 that letters such as this are not unique?

19 A. Correct.

20 Q. Do you recall any other situations,  
21 if not specifically, generally, where a member  
22 institution was sent a letter like this and  
23 chose not to respond?

24 MR. KOWALSKI: Objection.

25 A. I probably have similar occasions

1 myself, and I probably had enough at least  
2 clout to require a response under our  
3 procedures that permit us to demand a response.  
4 But that's in the enforcement program. I don't  
5 know that that could have applied in this  
6 circumstance.

7 Q. Right. Because this isn't an  
8 enforcement letter; this is something outside  
9 of the enforcement process?

10 A. Yes.

11 Q. Are you aware of any bylaw or NCAA  
12 mechanism that would require a member  
13 institution to respond to a letter like this  
14 one?

15 MR. KOWALSKI: Objection to form.

16 A. I am not aware of that, no.

17 Q. Okay. Now, I'm sorry. And please  
18 keep this on the record. And I apologize,  
19 Mr. Berst. I'm doing this actually in an  
20 effort to make sure we get out of here in a  
21 timely fashion.

22 MR. HAVERSTICK: You know, Counsel,  
23 I'm sorry. Tell me your name again.

24 MR. KOWALSKI: Allen Gardener, I was  
25 here all day yesterday.

1 MR. HAVERSTICK: Thanks, Allen. I  
2 know you're not as familiar with the case,  
3 and you may not know it, that the judge in  
4 this case entered an order some time ago in  
5 October --

6 MR. KOWALSKI: I'm sorry, is this a  
7 question?

8 MR. HAVERSTICK: It's a comment and  
9 then I'll finish and then you can talk, if  
10 you want. The judge's order -- Brian,  
11 speak up, you're familiar with it -- in  
12 spirit at least, requires us to be  
13 cooperative in discovery. And here's the  
14 thing. And I'll let it -- I'll be sporting  
15 and I'll let you guys choose how you want  
16 to proceed here.

17 MR. KOWALSKI: Yeah, we sure will  
18 answer, so go ahead.

19 MR. HAVERSTICK: There's really  
20 Option A and Option B. Option A is there's  
21 unspoken objections or laughing or  
22 commentary, pantomime from your counsel --

23 MR. KOWALSKI: Hold on. No, no, no,  
24 this is --

25 THE WITNESS: Are we talking about

1 this?

2 MR. HAVERSTICK: No, not you, sir.

3 Option B is we act like  
4 professionals, no snickering. We don't  
5 laugh.

6 MR. KOWALSKI: There's no  
7 snickering. You're getting notes passed  
8 back and forth. We're doing the same  
9 thing. We're just not doing it with notes.  
10 I have not snickered. I have shrugged a  
11 few times, and I will continue to shrug in  
12 response to questions from my co-counsel  
13 that require a shrug.

14 MR. HAVERSTICK: So then you're  
15 choosing Option A, which is you're going to  
16 do pantomime and other high jinx --

17 MR. KOWALSKI: That's garbage, and  
18 you know it. In fact, that's beyond  
19 garbage. That's a complete fabricated  
20 misrepresentation. I would suggest you  
21 focus on your questions and not me  
22 kibitzing with my co-counsel as you are  
23 with yours.

24 MR. HAVERSTICK: That's good you  
25 characterize it that way. I appreciate it.

1 So that's your option. Option A is you  
2 keep kibitzing, and I'm going to put it on  
3 the record, and if there's an issue down  
4 the line in a deposition --

5 MR. KOWALSKI: You know, I would  
6 like to swear him under oath and get some  
7 of this under oath because that was a  
8 blatant fabrication. If that's what he  
9 thinks he witnessed, I want it under oath  
10 because that's not true.

11 MR. HAVERSTICK: Option B -- and I  
12 prefer Option B -- is that we act like  
13 professionals. And Brian, I appreciate --

14 MR. KOWALSKI: This is  
15 unprofessional. Misrepresenting what's  
16 going on in this room is unprofessional.

17 MR. HAVERSTICK: Well, that's the  
18 whole point. We're either going to act  
19 like professionals -- and, Brian, I  
20 appreciate today that your objections have  
21 not been speaking objections. We're moving  
22 right along.

23 MR. KOWALSKI: Your questions are  
24 better, if that helps.

25 MR. HAVERSTICK: If we're going to

1 act like professionals, we're all going to  
2 act like professionals, and we'll get done  
3 and we're free to say anything we want  
4 about each other later on, and that's the  
5 option I choose because I'd like to be done  
6 with this. I believe you are all  
7 professionals. But if you choose Option  
8 A -- and I'm using your word -- more  
9 kibitzing, I'm going to start putting it on  
10 the record. And I'm going to note for the  
11 record --

12 MR. KOWALSKI: Go ahead. But at  
13 least be accurate.

14 MR. HAVERSTICK: Sure.

15 MR. KOWALSKI: Don't misrepresent  
16 anymore.

17 MR. HAVERSTICK: Sure, I won't. I  
18 don't think I have. I know I haven't.

19 MR. KOWALSKI: It's been nothing  
20 but.

21 MR. HAVERSTICK: I'm going to put it  
22 on the record, and then we'll let the judge  
23 see what she thinks about it and we'll let  
24 the judge decide whether she thinks your  
25 conduct, or anybody's conduct, mine, hers,

1 anybody else's has been in the spirit of  
2 her October 5 order.

3 MR. KOWALSKI: Matt, hold on.

4 MR. HAVERSTICK: Brian, I'm not  
5 done.

6 MR. KOWALSKI: You spoke about 10  
7 minutes straight.

8 MR. HAVERSTICK: Brian, I'm not  
9 done. I'll tell you when I'm done.

10 MR. KOWALSKI: I'll speak when I'm  
11 ready.

12 MR. HAVERSTICK: You're welcome to  
13 when I'm done. I'm trying to ask questions  
14 and move things along. As I said, I  
15 appreciate your professionalism. I don't  
16 appreciate high jinx and pantomime and  
17 nonsense, snickering, all this other stuff.

18 Sir, if you want to make an  
19 objection along with Brian, put it on the  
20 record so your name is attached to it.

21 MR. KOWALSKI: I don't need to. I  
22 can do exactly what you've done with the  
23 four individuals you have on your side of  
24 the table.

25 MR. HAVERSTICK: Giggle, laugh,

1 shrug.

2 MR. KOWALSKI: I haven't giggled  
3 since I was 8 years old.

4 MR. HAVERSTICK: How old are you  
5 today?

6 MR. KOWALSKI: Older than you and  
7 old enough to know crap when I hear it. So  
8 if you're going to misrepresent and lie,  
9 let's get the judge on the phone now, I'm  
10 happy to.

11 MR. HAVERSTICK: You want to?

12 MR. KOWALSKI: Sure. I will swear  
13 to exactly what I've done today. I will  
14 put it under oath. Will you?

15 MR. HAVERSTICK: Absolutely.

16 MR. KOWALSKI: Then I know what kind  
17 of person I'm dealing with because what you  
18 just said is completely untrue.

19 MR. HAVERSTICK: Okay. Well, I  
20 don't think it is.

21 MR. KOWALSKI: Let's bring some  
22 cameras in. I'm happy to be filmed during  
23 the entire time.

24 MR. HAVERSTICK: That's a great  
25 idea. Let's do that.

1 MR. KOWALSKI: Go ahead.

2 MR. HAVERSTICK: Let's do it for the  
3 next deposition.

4 MR. KOWALSKI: Do it now.

5 MR. HAVERSTICK: You want to?

6 MR. KOWALSKI: Sure. Bring them in.

7 MR. HAVERSTICK: Here's why I prefer  
8 Option B. Option B is where we act civil  
9 to each other and don't --

10 MR. KOWALSKI: We were, until you  
11 started this. If you're going to lie about  
12 me on the record, expect me to be unhappy  
13 and less civil.

14 MR. HAVERSTICK: That's why we're  
15 going to make a record from now on of all  
16 of the stuff, all the sidebar commentary,  
17 the laughing, all the other stuff so there  
18 is a record and it's clean and so the judge  
19 can decide. Is that fair?

20 MR. KOWALSKI: It's your deposition,  
21 you do what you want, but each time you  
22 misrepresent what happened, expect me to  
23 respond.

24 MR. HAVERSTICK: You'll have your  
25 opportunity to, if we're making a record,

1 that's the whole point.

2 MR. KOWALSKI: Feel free.

3 MR. HAVERSTICK: The whole point is  
4 we have a record of nonsense --

5 MR. KOWALSKI: Let's do this. Why  
6 don't we bring in a magistrate and have  
7 somebody sit here with us if you're  
8 concerned.

9 MR. HAVERSTICK: If you'd like to,  
10 we can do that.

11 MR. KOWALSKI: It would keep you  
12 honest, which I would appreciate. Let's go  
13 ahead and agree to split the cost right  
14 now.

15 MR. HAVERSTICK: The difference here  
16 is I have been honest. You've been  
17 dishonest, sir.

18 MR. KOWALSKI: No, no, no.

19 MR. HAVERSTICK: I watched it all  
20 day yesterday.

21 MR. KOWALSKI: You weren't even in  
22 here yesterday. You were off in the hall  
23 screwing around. Ask your co-counsel what  
24 percentage of the deposition you were here.  
25 Let's ask them all, down the line. Ask

1     them all, down the line.  You don't know  
2     what happened yesterday because you weren't  
3     here.

4             MR. HAVERSTICK:  Only makes me think  
5     that the couple times I wasn't here and saw  
6     you giggle and snicker --

7             MR. KOWALSKI:  So you didn't see  
8     what happened all day yesterday?  So you do  
9     admit your earlier statement was  
10    inaccurate?  Are we clear?

11            MR. HAVERSTICK:  Which one?

12            MR. KOWALSKI:  That you saw what  
13    happened all day yesterday as you  
14    represent.

15            MR. HAVERSTICK:  I don't think I  
16    said that actually.

17            MR. KOWALSKI:  You did.  You did.  
18    And it will be on the record because you  
19    chose to do this on the record.

20            MR. HAVERSTICK:  That's the whole  
21    point.  I'd like this on the record.  I  
22    take you at your word that you want it on  
23    the record too.  So that's great.  Let's  
24    keep it on the record.

25            MR. KOWALSKI:  I've also offered you

1 other options that will keep you honest.  
2 Let's bring in cameras or let's bring in a  
3 monitor. I'm happy to.

4 MR. HAVERSTICK: That's great. If  
5 you want to delay the deposition --

6 MR. KOWALSKI: Your entire statement  
7 was ridiculous and false.

8 MR. HAVERSTICK: You know, it seems  
9 to me that your overreaction to this is  
10 really kind of the sine qua non of what's  
11 going on here. I'd like to continue the  
12 deposition, and I'd like to continue asking  
13 questions, and I'd like to --

14 MR. KOWALSKI: You should.

15 MR. HAVERSTICK: I'd like to  
16 continue to expect Brian's very appropriate  
17 objections and, very frankly, appropriate  
18 deportment in the way we're conducting the  
19 deposition. That's all I'm asking. And if  
20 we're going to do anything other than that,  
21 I'd like it to be on the record. And  
22 absolutely by all means, if you think I'm  
23 doing something that I shouldn't be doing,  
24 please put it on the record.

25 MR. KOWALSKI: I did.

1 MR. HAVERSTICK: That's the point.

2 MR. KOWALSKI: And I will.

3 MR. HAVERSTICK: Great. Then we're  
4 choosing Option A, and Option A is fine  
5 with me too. Okay?

6 THE WITNESS: I'd like to request  
7 whatever it is you guys are talking about,  
8 it's including the time you're keeping me  
9 here. And for whatever it's worth,  
10 whatever you guys are talking about, I know  
11 nothing of that because I'm paying  
12 attention to you. I see you occasionally  
13 and you occasionally. I have not heard,  
14 seen, received any signals from anybody.  
15 Everything you've heard from me is coming  
16 from me and will continue to come from me.

17 MR. KOWALSKI: I can assure you that  
18 is true.

19 MR. HAVERSTICK: Well, that's  
20 absolutely true. And I don't mean to  
21 reflect upon the witness at all. I'm not  
22 talking about the witness at all.

23 THE WITNESS: Thank you.

24 MR. HAVERSTICK: You've been a  
25 gentleman, and I appreciate having our

1 conversation. And I'd like to continue  
2 having our conversation because I think  
3 it's fruitful, and I think we can get out  
4 of here at a reasonable hour if we keep  
5 plowing along.

6 MR. KOWALSKI: Matt, let me just say  
7 one thing because I don't want to waste any  
8 more of Mr. Berst's time, which is  
9 valuable, but I also want to make clear  
10 that if we're talking about cooperation in  
11 the spirit of Judge Covey's order, that  
12 includes the thousands of documents that  
13 we've been producing, the team of  
14 associates who are working around the clock  
15 to get you what you need and what you've  
16 requested, our extraordinary efforts to  
17 make people available for depositions on a  
18 very short time period, the fact that we  
19 have not objected once to how long a  
20 deposition has been going, and our constant  
21 responses to your constant questions about  
22 privilege issues and responding to motions  
23 we think are meritless. So we've tried  
24 extremely hard to be cooperative, and I  
25 appreciate the words you said about me, but

1 I feel like I have to put on the record as  
2 well that the notion that we aren't being  
3 cooperative in the spirit of Judge Covey's  
4 letter is outrageous to me.

5 MR. HAVERSTICK: That's all I'm  
6 going to say.

7 MR. KOWALSKI: That's fine.

8 MR. HAVERSTICK: I did not mean to  
9 characterize your behavior outside of this  
10 deposition room as uncooperative. The  
11 record is what it is. I'm talking only  
12 about ways today that we can continue  
13 moving along and not be distracted.

14 MR. KOWALSKI: That's good. Let's  
15 go.

16 Q. All right. Back to our  
17 conversation.

18 MR. KOWALSKI: Back to your  
19 deposition.

20 Q. Back to our conversation.

21 Were you aware that a response to  
22 this November 17 letter was written by chief  
23 counsel or general counsel for Penn State  
24 University, Cynthia Baldwin?

25 A. No.

1 Q. Were you ever told she wrote one --  
2 well, let me ask, I don't want to ask too many  
3 questions.

4 Were you ever told she wrote one?

5 A. I don't believe so, no.

6 Q. To your knowledge, you were never  
7 shown it, it was never discussed with you?

8 A. No.

9 Q. I'm going to represent for you, and  
10 we can -- if I could put the documents in front  
11 of you if there's not agreement with counsel,  
12 that Ms. Baldwin in drafting a response sent it  
13 for review to Donald Remy prior to it being  
14 officially sent on behalf of Penn State.

15 MR. KOWALSKI: If that's true, I  
16 think we need to see the document.

17 MR. HAVERSTICK: Okay. Yeah. And  
18 this is not a trick for you.

19 MR. KOWALSKI: That's fine. I think  
20 it just would be fair for him to look at  
21 the document.

22 MR. HAVERSTICK: We're looking at  
23 Tab 13.

24 MR. KOWALSKI: I'm sorry.

25 MR. HAVERSTICK: I am too, by the

1 way. You've been a pleasure, and I  
2 appreciate your forthrightness in how  
3 you've been answering questions.

4 A. Okay. I've seen this.

5 Q. Oh, you have -- you've seen it right  
6 now?

7 A. I've seen it right now, yes.

8 Q. Can we agree, and this goes for  
9 Mr. Kowalski too, that this is a -- this  
10 represents an email to Donald Remy from Cynthia  
11 Baldwin, the general counsel of Penn State at  
12 the time, and that the email to Mr. Remy  
13 includes a draft letter to Mark Emmert written  
14 by Ms. Baldwin that is in response to the  
15 November 17 letter from President Emmert?

16 MR. KOWALSKI: To the extent the  
17 question is to me, I'll agree it says what  
18 it is.

19 MR. HAVERSTICK: Yeah, I want the  
20 record --

21 MR. KOWALSKI: It says what it says.

22 A. It has draft on it. To me, this is  
23 not a response to the letter. This is an  
24 explanation for why the response will come  
25 later.

1 Q. Right. That's absolutely right.

2 Yes.

3 A. I think that's what I said earlier,  
4 it was my understanding that we didn't get a  
5 response. We got a postponement of receiving a  
6 response to the letter. You asked me if we  
7 ever did receive a response to the letter. I  
8 answered no, to my recollection, on that point.

9 Q. You recall getting at some point  
10 down the line a response from Ms. Baldwin  
11 saying we'll answer later, something like that?

12 A. I didn't recall this.

13 Q. Okay.

14 A. I said earlier that my recollection  
15 was that we understood and agreed that they  
16 didn't have to respond to the letter as  
17 outlined then, but they would at some juncture,  
18 and to my knowledge, that juncture never came.

19 Q. Here's my question and the reason  
20 for me showing you this document. Do you know  
21 of any reason why Penn State's general counsel  
22 would preview a draft response to Dr. Emmert by  
23 sending it to Mr. Remy in this fashion?

24 MR. KOWALSKI: Objection to form.

25 Characterizing the document.

1           A.       Well, I don't have a specific answer  
2       to that question. It seems perfectly  
3       reasonable that if the general counsel is  
4       trying to figure out how to maneuver through  
5       these processes with the various demands on the  
6       institution for various requests for  
7       information and investigations that were going  
8       to be ongoing that that person would be in  
9       communication with NCAA's legal counsel.

10          Q.       Were you aware, aside from this  
11       letter, communications around this time period  
12       between Ms. Baldwin and Mr. Remy regarding Penn  
13       State's response to NCAA's inquiries?

14                 MR. KOWALSKI: If you can do so  
15       without revealing the contents of any  
16       privileged conversations with Mr. Remy, go  
17       ahead.

18          A.       I don't recall any substantive  
19       responses to the questions that had been posed  
20       by Mark Emmert.

21          Q.       But my question was whether you were  
22       aware of communication around this time period  
23       between Mr. Remy and Ms. Baldwin about Penn  
24       State's response, be it this letter, be it  
25       phone calls, be it other emails?

1                   MR. KOWALSKI: And in answering,  
2                   please don't reveal the contents of  
3                   privileged communications with Mr. Remy.

4                   A.       Yeah, I don't believe I knew  
5                   anything.

6                   Q.       Okay.

7                   A.       Except the impression that I had  
8                   given you earlier that the institution had  
9                   requested not to respond by the deadline and  
10                  that there would be a response forthcoming  
11                  later, but I don't know when that was.

12                  Q.       When was the first time that you  
13                  became aware that the Freeh Group or Freeh,  
14                  Sullivan & Sporkin, we'll just call it the  
15                  Freeh Group because, frankly, there are too  
16                  many cooperate entities involved in it to just  
17                  name it one thing, when is the first time you  
18                  recall the Freeh Group being retained or  
19                  involved with Penn State to do what turned out  
20                  to be the Freeh Report?

21                  MR. KOWALSKI: Objection to form.

22                  A.       I don't have any recollection of  
23                  knowing at any particular time. I don't even  
24                  know the source of knowing whether it was from  
25                  public information or from internal people. I

1 just -- I don't have a recollection of that.

2 Q. Were you ever made aware that in  
3 December, early December of 2011, that NCAA  
4 personnel were meeting with Freeh Group  
5 personnel?

6 MR. KOWALSKI: And you can answer,  
7 if you can, without revealing the contents  
8 of any privileged legal communications with  
9 Mr. Remy.

10 A. I don't remember that.

11 Q. You don't remember that?

12 A. No.

13 Q. Were you ever made aware that both  
14 counsel for the Big Ten and Mr. Remy were  
15 having throughout the end of 2011 and through  
16 the first half of 2012 weekly telephone calls  
17 with Freeh Group personnel?

18 MR. KOWALSKI: Objection to form.  
19 Please don't reveal any privileged  
20 communications in answering.

21 A. I don't believe that I knew that,  
22 no.

23 Q. Were you aware that -- did you  
24 become aware that NCAA personnel were providing  
25 draft interview questions to Freeh Group

1 personnel as Freeh Group personnel undertook  
2 their Penn State review?

3 MR. KOWALSKI: Objection to form.  
4 Please don't reveal the contents of any  
5 privileged communications.

6 A. I -- I don't believe I'm aware of  
7 that either.

8 Q. Were you ever made aware that Julie  
9 Roe gave a multi-hour PowerPoint presentation  
10 on issues of institutional control to Freeh  
11 Group personnel?

12 MR. KOWALSKI: Objection to form.  
13 Same objection regarding privilege or  
14 caution regarding privilege, I should say.

15 A. No.

16 Q. All of this is news to you? This  
17 was not something that was discussed --

18 MR. KOWALSKI: Objection to form.  
19 News assumes --

20 A. I don't believe I know any of those  
21 things.

22 Q. Okay. You're hearing this -- these  
23 questions are not --

24 A. You're -- yeah.

25 Q. I see.

1           Are you aware of whether there were  
2           contacts throughout 2012 by the Freeh Group  
3           with NCAA personnel in which investigative  
4           findings were being discussed with NCAA  
5           personnel by Freeh Group people?

6           MR. KOWALSKI:  Objection to form.  
7           Same caution regarding privilege.

8           MS. DOBLICK:  I also object to form.

9           A.     No.

10          Q.     Do you know whether -- let me ask it  
11          this way:  When did you learn that the Freeh  
12          Group was about to or had issued its report?

13          A.     I think when it became public.

14          Q.     You did not know prior to the time  
15          it became public that the report was imminent?

16          MR. KOWALSKI:  Objection to form.

17          A.     I don't believe so.  I've got to  
18          think about when it became public.  I don't  
19          know when that was either, but I think I just  
20          read it like everybody else.

21          Q.     I never remember either.  I want to  
22          say it was July 12, 2012, but probably  
23          everybody else in the room is going to tell me  
24          I'm wrong.

25                    But in any event --

1 A. Seems right to me.

2 Q. You don't have a recall of being  
3 given any advance notice that the report was  
4 being released?

5 A. I'm almost positive I was not.

6 Q. Are you aware, as we sit here today,  
7 of whether anyone else at NCAA was made aware  
8 of the impending release of the Freeh Report?

9 MR. KOWALSKI: Objection to form.

10 Same caution regarding privilege.

11 Go ahead.

12 A. I don't have that information, no.

13 Q. I think -- I think the answer to  
14 this one has to be a no, but I'll ask it anyway  
15 for sake of completeness, you're not aware of  
16 whether anyone at NCAA prior to the release of  
17 the Freeh Report was given any information  
18 about what was contained in the report before  
19 its release?

20 MR. KOWALSKI: Objection to form.

21 A. I'm not aware of it, no.

22 Q. Same -- with all of those  
23 questions --

24 MR. KOWALSKI: I understand.

25 Q. -- I don't want to know if any of

1 this information came from Mr. Remy if it was  
2 for the purposes of receiving legal advice.  
3 But the answer is no, right?

4 A. It's no.

5 Q. You reviewed the Freeh Report after  
6 it came out actually?

7 A. Eventually when it was released.

8 Q. Right.

9 A. I got a copy, I'm sure.

10 Q. What do you recall your reactions  
11 being to the Freeh Report?

12 A. I tried really not to react  
13 particularly. I recognized that the Freeh  
14 Report had been completed that -- about the  
15 same time it was being accepted by the  
16 university. And soon thereafter or around the  
17 same time, they had indicated they were going  
18 to implement all the recommendations of the  
19 Freeh Report.

20 Q. Where did you acquire the knowledge  
21 or information that the Freeh Report was  
22 accepted by the university?

23 A. It seemed to me like it was a press  
24 release from the university.

25 Q. How soon do you recall after the

1 Freeh Report's public release was there  
2 internal discussion at NCAA about penalty or  
3 enforcement proceedings against the university?

4 MR. KOWALSKI: We're going to have  
5 to be careful on privilege here. So he's  
6 asking a timing question. For now, let's  
7 just take it a step at a time.

8 A. Yeah, I don't recall when the Freeh  
9 Report actually came out.

10 Q. So let's look at Tab 21.

11 MR. HAVERSTICK: Actually, you know  
12 what? Hold on. Let's take a look at  
13 Tab 18 first, just so we establish  
14 something and mark as Berst 5. Thank you.

15 (Berst Exhibit Number 5 marked for  
16 identification.)

17 Q. I'm going to show you an email from  
18 Bob Williams that looks like it goes to Mark  
19 Emmert and then gets to you, but I may have  
20 that kind of fouled up, but take a look.

21 A. Okay.

22 Q. Does this establish for all of us  
23 that the Freeh Report was released on July 12,  
24 and according to Bob Williams, posted online at  
25 9:05 a.m.?

1 MR. KOWALSKI: Objection. Form.

2 A. Well, it's probably reading more  
3 than is in this email. I'm willing to say it  
4 must have been around this time. But my dates  
5 and days are going to be a little confused  
6 around here.

7 Q. Mine too.  
8 What's purple category?

9 A. No idea.

10 Q. Is that a designation that Mark  
11 Emmert uses or would use, if you know?

12 MR. KOWALSKI: Objection.

13 A. I don't know.

14 Q. Okay.

15 MR. HAVERSTICK: Let's look at  
16 Tab 19, which we will mark as Berst 6.

17 (Berst Exhibit Number 6 marked for  
18 identification.)

19 A. All right.

20 Q. This document notes a conference  
21 call that is -- I think, it means follow-up.  
22 It says F up, but we'll just assume it's  
23 follow-up, to report on Penn State. It's  
24 confusing because the time says 1:30 p.m., but  
25 then it also says 5:30 p.m., but in any event,

1 the date of this appointment invite is  
2 July 12th, correct?

3 A. Yes.

4 Q. Does this, upon reviewing this  
5 document, does this jog your memory that you  
6 had a conference call regarding the Freeh  
7 Report on the day of its release?

8 A. I don't know whether it's the day of  
9 the release. I would have guessed this was a  
10 follow-up to a conference call involving the  
11 executive committee and board of directors and  
12 that this is sort of a staff follow-up to that.  
13 But I could be wrong about that.

14 Q. So the report on Penn State may not  
15 necessarily reference the Freeh Report? It  
16 could reference a report on Penn State given to  
17 the executive committee?

18 A. It could. I don't know. My  
19 recollection is that there would have been a  
20 call with the executive committee then, which  
21 would mean the Freeh Report would have been out  
22 earlier.

23 Q. Are minutes taken of these  
24 executive -- of calls like ones like this the  
25 executive committee would have undertaken?

1 A. Of the executive committee, yes.

2 Q. So if this had been a conference  
3 call of the executive committee to discuss  
4 something related to Penn State, it would have  
5 been memorialized in some fashion?

6 A. That wouldn't be this call. This is  
7 a staff call.

8 Q. I see.

9 A. Whenever the executive committee  
10 call is, yes, there would be a report of that  
11 call.

12 MR. HAVERSTICK: Brian, I presume we  
13 requested all this stuff, but to the extent  
14 there are executive committee minutes  
15 reflecting calls around this time period,  
16 I'd ask they be produced. They may have,  
17 for all I know.

18 MR. KOWALSKI: They have been, to  
19 the best of my knowledge.

20 Q. Okay. I'm going to, to save time  
21 because I don't think, unless you tell me  
22 otherwise, time particularly matters. I'm  
23 going to represent to you in the next several  
24 days after July 12 there were several calls  
25 scheduled in which you were a participant.

1 Does that generally sound right?

2 A. Yes.

3 Q. If anybody wants, we can go through  
4 that and establish when they were, but I don't  
5 think it's particularly germane to what I'm  
6 asking unless you care to see the invite.

7 MR. KOWALSKI: As long as you're  
8 comfortable that that is factually  
9 accurate.

10 A. It's factually accurate that I was  
11 involved in some calls then, so I think I'm  
12 fine, yeah, sure.

13 Q. How soon after the release of the  
14 Freeh Report publicly do you recall anyone on  
15 these calls or meetings discussing enforcement  
16 actions or penalty actions against Penn State  
17 University?

18 MR. KOWALSKI: Objection.

19 A. Well, if it really is going to the  
20 timing, then you do need to show me. Show me  
21 the Freeh Report, when it was released, show me  
22 the executive committee call, and I can tell  
23 you precisely.

24 Q. Okay.

25 A. Then I would have had calls

1 following that executive committee call with  
2 Gene Marsh and others.

3 MR. KOWALSKI: I think it's also  
4 clear at this point in the process, our  
5 view is that we're asserting privilege over  
6 the communications that occurred on these  
7 calls where Mr. Remy was present and  
8 providing legal advice. So we're going to  
9 take that position today. We'll see what  
10 the questions are, but to the extent the  
11 questions call for disclosing specific  
12 communications that occurred at those  
13 meetings, we're going to instruct you not  
14 to answer.

15 Q. That's the same caveat I broached in  
16 the beginning --

17 A. Yeah, it gets confusing, but let's  
18 go.

19 MR. KOWALSKI: We'll get through it.

20 Q. Let's pull Tab -- let's pull Tab 15  
21 first.

22 MR. HAVERSTICK: And Brian, for  
23 simplicity sake, can we agree for the  
24 record that the Freeh Report was released  
25 publicly on July 12th?

1 MR. KOWALSKI: That's the date on  
2 the front of the Freeh Report. I have no  
3 reason to think otherwise.

4 MR. HAVERSTICK: That's what the  
5 email from Williams says too that it's just  
6 been posted.

7 MR. KOWALSKI: It appears that, yes.

8 MR. HAVERSTICK: Yeah, I mean,  
9 there's another email where I can show it,  
10 but --

11 MR. KOWALSKI: I mean, Penn State's  
12 counsel is here, and they commissioned the  
13 Freeh Report. So they're probably the best  
14 source of when it was --

15 MR. HAVERSTICK: Donna, are we right  
16 about that? Was it released publicly on  
17 July 12th?

18 MS. DOBLICK: To the best of my  
19 knowledge, yes.

20 Q. Okay. Well, then, if it turns out  
21 that we're all wildly wrong, you'll get a  
22 chance to review your testimony and we can --

23 A. Swear everybody in.

24 MR. HAVERSTICK: There we go, okay.  
25 I don't want to mark it as an exhibit, but

1 can we note for the record that the Freeh  
2 Report is dated July 12th, 2012?

3 (Berst Exhibit Number 7 marked for  
4 identification.)

5 Q. Here is Berst 7. It's a calendar  
6 invite for July 10, 2012. And now I've lost my  
7 place in the tabs, which tab is that?

8 MR. KOWALSKI: Is this Exhibit 7?

9 MS. MADDEN: Yes.

10 Q. This meeting subject is called Penn  
11 State Update; you agree?

12 A. Yes.

13 Q. Does seeing -- and you're on it, you  
14 were invited to this --

15 A. Right.

16 Q. -- meeting? This was not a  
17 telephone call, it appears to be a meeting?

18 A. I don't remember one in the evening  
19 now. I wonder if it is a call.

20 Q. It lists where is the 341 B Bravo  
21 meeting room, but there is also dial-in  
22 information so who knows.

23 MS. MADDEN: Can we go off the  
24 record?

25 MR. HAVERSTICK: Sure.

1 Q. I think we shouldn't assume any of  
2 us that it happened at the time the document  
3 says it happened. I'm less concerned about the  
4 time and more about the date, unless the time  
5 is important or relevant to you?

6 A. No, it makes more sense that it  
7 would be 2:00 to 3:00 which is referenced in  
8 here as well.

9 MR. KOWALSKI: We're back on the  
10 record.

11 MR. HAVERSTICK: Yeah.

12 A. I think it looks like there was a  
13 meeting on the 10th.

14 Q. Do you have any recall of what the  
15 Penn State update, which is the subject of this  
16 meeting, was about?

17 MR. KOWALSKI: Caution you not to  
18 reveal -- so caution you not to reveal the  
19 contents of privileged legal  
20 communications. If you remember, you can  
21 certainly say what the topic was.

22 A. I don't remember. I don't remember  
23 the meeting.

24 Q. To your recollection, you don't  
25 recall whether anyone discussed the impending

1 release of the Freeh Report?

2 MR. KOWALSKI: Same objection

3 regarding privilege.

4 A. I don't recall. I don't recall the  
5 sequence of how things occurred.

6 Q. Okay.

7 A. I recall I certainly was in a  
8 meeting at some point with a number of these  
9 individuals regarding next steps, but I don't  
10 know if it's before or after or at the same  
11 time.

12 Q. Okay. And I'll do this quickly  
13 because I just want to establish for your  
14 comfort the timeline and when the meetings  
15 happened and then we can get into if it's  
16 relevant -- it can be or not.

17 (Berst Exhibit Number 8 marked for  
18 identification.)

19 Q. We're now looking at Berst 8, which  
20 is another appointment. And I think we put on  
21 the record that none of us can be comfortable  
22 that the times are necessarily correct in the  
23 start and end?

24 This is another appointment to which  
25 you were invited?

1 A. Yes.

2 Q. Also subject update on Penn State?

3 A. Yes.

4 Q. And this one says conference call  
5 and there's a number, so presumably it was.

6 So do you recall this meeting?

7 A. No.

8 Q. At the bottom in the notation,  
9 there's a 7/11/12 with a DBY beside it. And  
10 that says: A brief update regarding Mark's  
11 call this morning, 5/10 minutes.

12 Do you see that?

13 A. I do.

14 Q. Does reading that give you any  
15 recollection about Mark's call, what that was?

16 A. No.

17 Q. What it was about?

18 A. No.

19 Q. Okay. And we agree that this one  
20 was the day before the Freeh Report was  
21 released?

22 A. It appears so, yes.

23 Q. And you don't recall the Freeh  
24 Report's release being discussed at this  
25 meeting?

1           A.       I don't have a recollection of the  
2 meeting.

3           Q.       Of it at all?

4           A.       No.

5           Q.       Good enough.

6                   MR. HAVERSTICK:  Let's go to, we got  
7 19, right?

8                   MS. MADDEN:  Yes.

9                   MR. HAVERSTICK:  Next one is Tab 21,  
10 please.

11                               (Berst Exhibit Number 9 marked for  
12 identification.)

13           Q.       This is Berst 9.  It's another  
14 invite, another telephone call it appears.  We  
15 agree that this call, again, you're invited  
16 to -- by the way, it's the same group that's  
17 been invited to the several previous invites  
18 and calls?

19           A.       It appears to be, yes.

20           Q.       Would this be the working group that  
21 would be initially discussing reaction to the  
22 Freeh Report, if you know?

23           A.       Well, I wouldn't characterize it as  
24 a working group.  I think it's basically the  
25 same group of vice presidents who gathered

1 before to talk about Penn State matters. So  
2 that conversation among staff members  
3 continued.

4 Q. These would be the people who, as  
5 you recall, were involved in conversations  
6 about what to do in response to the Freeh  
7 Report?

8 A. Well, eventually the answer to that  
9 is yes. But earlier it was related to the  
10 November letter. But it was the same group of  
11 people trying to talk through what was  
12 occurring in the Penn State matter.

13 Q. This subject follow-up on Penn State  
14 discussion, it's dated 7/13, and we've  
15 established it's the day after the release of  
16 the Freeh Report, do you have any specific  
17 recall of this one?

18 A. No, I don't know which -- I don't  
19 know what occurred.

20 Q. Next one --

21 MR. HAVERSTICK: Brian, do you want  
22 me to just go through and represent and by  
23 document name when there were calls? I  
24 mean, I can put them all --

25 A. It will help me once you --

1 Q. Great.

2 A. -- pin down whenever I'm talking to  
3 Gene.

4 Q. Let's do that, then.

5 MR. HAVERSTICK: 24.

6 (Berst Exhibit Number 10 marked for  
7 identification.)

8 Q. That's Berst 10.

9 Now, this conference call is to a  
10 wider group -- can you identify, you don't have  
11 to name them, but if you can tell me what group  
12 we're looking at here in the "To" line, that  
13 would be helpful?

14 A. This would be the executive  
15 committee of the association, which is a group  
16 of presidents from all three divisions, and in  
17 addition, the members of the board of directors  
18 from Division I.

19 Q. So this would have been a conference  
20 call, assuming all of these folks dialed in,  
21 that would have been a combination call between  
22 the D1 -- a D1 committee and the executive  
23 board?

24 A. Executive committee, yes.

25 Q. Executive committee, pardon me.

1 A. Yes.

2 Q. There are also several NCAA staffers  
3 who are on this invite, including you. Do you  
4 recall a teleconference on or about this time  
5 to discuss Penn State?

6 A. I recall a couple of those calls. I  
7 would have guessed this was the second one, but  
8 I'm not certain of that.

9 Q. Would there -- if I understood your  
10 earlier testimony, there would be meeting  
11 minutes of any call of this nature involving  
12 the executive committee and the D1 board?

13 MR. KOWALSKI: Objection to form.

14 A. There is a -- it's called a report.  
15 It doesn't provide much more than action items,  
16 but it indicates the substance of what the  
17 topics were that were discussed.

18 Q. Okay.

19 MR. KOWALSKI: That's a general  
20 matter, right?

21 A. Right.

22 Q. Yeah, that's not particular to this  
23 matter ...

24 MR. KOWALSKI: Yeah.

25 Q. Do you recall any specific

1 conversations or any particular topic matters  
2 in this telephone call?

3 MR. KOWALSKI: And just caution you,  
4 you can answer that question. But to the  
5 extent Mr. Remy provided legal advice or  
6 legal advice was requested from Donald  
7 Remy, you can't disclose that, but you can  
8 otherwise talk about the discussions that  
9 were on this call.

10 A. The -- well, the difficulty I have  
11 is I'm not sure which -- which call this is.  
12 There are two different calls involving  
13 executive committee members. So the specific  
14 answer to your question is no, I don't  
15 remember.

16 Q. You do recall two telephone calls  
17 with the executive committee to discuss the  
18 reaction to the Freeh Report? You just don't  
19 remember which one this was in particular?

20 A. Correct.

21 MR. HAVERSTICK: Next one is Tab 25.  
22 And that's Berst 11.

23 (Berst Exhibit Number 11 marked for  
24 identification.)

25 Q. And this, again, is a conference

1 call, subject, Penn State, dated 7/17. And now  
2 we're back to -- I call it the working group, I  
3 know that's not what we mean. But the same  
4 group of individuals who have been generally  
5 discussing Penn State matters and Freeh Group  
6 matters, correct?

7 A. Right.

8 Q. Do you recall this telephone call?

9 A. No, I don't recall. I mean, I  
10 recall what happened during a time period, but  
11 I can't fix that to any particular call. The  
12 date doesn't quite hang together.

13 Q. So I'll represent based on looking  
14 at these exhibits that there are a series of  
15 calls spanning July 10 to July 17 and we've  
16 established that the Freeh Report was issued in  
17 the morning of July 12th, and there were  
18 several telephone calls in that time period.

19 In general, is it your recollection  
20 that it is within that time period and on these  
21 calls that you and the others were beginning to  
22 discuss NCAA's reactions to the Freeh Report?

23 MR. KOWALSKI: And he's asking a  
24 yes-or-no question.

25 Q. Yeah. I'm not asking what you

1 talked about.

2 A. The answer is yes. I mean, I would  
3 have fixed the time between about the 12th and  
4 around the 17th/18th, somewhere in there, yes.

5 Q. And as far as you recall, it had to  
6 have been after the 12th, because you had no  
7 access to either the report or the material in  
8 the report prior to its public release?

9 A. That's what I'm thinking, yes.

10 Q. When is the first time -- no, let me  
11 ask it this way: Is it within that period from  
12 July 12 to July 17 that you recall for the  
13 first time that NCAA was contemplating some  
14 penalty action against Penn State University in  
15 reaction to the Freeh Report?

16 MR. KOWALSKI: Object to form.

17 And you can answer this question,  
18 but just be careful not to reveal specific  
19 communications with legal counsel.

20 A. The -- I think the initial call that  
21 I recall that I can't fix in time with the  
22 executive committee basically was an effort by  
23 the president, by Mark Emmert, to assess from  
24 the executive committee members what their  
25 general reactions were and the seriousness with

1 which they were taking the matter.

2 Q. What do you recall of the assessment  
3 of the executive committee members in reaction  
4 to the Freeh Report? And I know this is a hard  
5 one, but as specifically as possible with  
6 individual folks, if you can.

7 A. I'll have some trouble with  
8 individual folks, but almost all of them used  
9 words like it's the kind of matter that should  
10 result in a death penalty. I don't think they  
11 knew what death penalty was exactly. And  
12 others may have said that there should be a  
13 suspension of play in the sport for a period of  
14 time. So there was a real outrage on the part  
15 of individuals about the matter. And I think I  
16 said to someone else that the only one I  
17 remember not really going to that extreme was  
18 Judy Genshaft from South Florida who broached  
19 the subject from the point of view that she  
20 would be interested in some follow-up  
21 considerations or review by the president, Mark  
22 Emmert, on the subject of penalties that might  
23 apply under these kinds of circumstances, but  
24 that this clearly was something that the  
25 executive committee may well assume

1 jurisdiction in evaluating further or at least  
2 encourage the president to proceed with the,  
3 you know, with the -- with a substantial  
4 penalty in the matter.

5 Q. Do you recall on the executive  
6 committee/D1 board call whether Joanna Simon --

7 A. Lou Anna Simon.

8 Q. Thank you.

9 Was on that call?

10 A. I only have a vague recollection in  
11 that regard. I think at least on the initial  
12 call, that she would have been. If her name is  
13 on the record, then she would have been on the  
14 call. She did not comment beyond indicating  
15 that the Big Ten also had some sort of a  
16 procedure or process of review in the matter as  
17 well. So I think she refrained from offering  
18 comment.

19 Q. Did she say that that process was  
20 underway, or was she just indicating that we  
21 have our own process too, if you remember?

22 A. I don't remember specifically that.  
23 I think later they actually did have a process  
24 underway, but I don't know if in the first  
25 instance they did.

1           Q.       Parenthetically, did you form an  
2       opinion at this time as to whether, I'm going  
3       to call it the death penalty, but can we agree  
4       we're talking about suspension of play, was an  
5       appropriate penalty for what you saw in the  
6       Freeh Report?

7                   MR. KOWALSKI:  Objection to form.

8           A.       I didn't -- I don't think I offered  
9       that kind of comment to the group at the time.  
10       I think what I got from the call was a little  
11       bit of surprise that the matter was considered  
12       as serious and that there were so many other  
13       presidents who believe that that was the  
14       appropriate action ultimately for what they had  
15       been reading about, what they had been -- their  
16       own, at least understanding at that point what  
17       the case was all about.

18           Q.       Why surprise?

19           A.       I have never heard a set of  
20       presidents speak in such direct and serious  
21       tone about it.  I think they were essentially  
22       universal in their opinion that this cut to the  
23       underbelly of intercollegiate athletics.

24           Q.       So your surprise was generated by  
25       hearing university presidents be so vocal on

1 such a harsh potential penalty?

2 A. Yes.

3 Q. Was your surprise generated at all  
4 by your belief about the propriety of the death  
5 penalty or suspension of play?

6 MR. KOWALSKI: Objection to the  
7 form.

8 A. Well, I think what I was thinking at  
9 the time was that I have, you know, processed  
10 about 2,000 infractions cases in serious  
11 matters, and there are lots of sides to every  
12 issue. And it seemed interesting to me that  
13 there was such interest in heading in that  
14 direction or framing their comments in that  
15 manner without reviewing all of the information  
16 that was available.

17 I don't know whether they had read  
18 the Freeh Report at that point or just were  
19 reacting to some of the details. But the  
20 reactions were surprising to me.

21 Q. At this point, had you concluded  
22 that NCAA should take action against Penn  
23 State, whatever that action may be?

24 MR. KOWALSKI: Him personally?

25 MR. HAVERSTICK: Him personally.

1 MR. KOWALSKI: Objection to form.

2 Go ahead.

3 A. I don't know that I thought of it in  
4 those terms. I thought action was going to be  
5 taken with regard to Penn State. And at that  
6 point, it really was a question of what kind of  
7 a process was going to be implemented in order  
8 for that to take place.

9 Q. Did you have an opinion at that time  
10 about what process was the correct process to  
11 be implemented?

12 MR. KOWALSKI: Objection to form.

13 A. I don't know if I had it then or if  
14 I had it within 24 hours. But my view was that  
15 of the options, it really depends on the time  
16 spent and the motivation of the school  
17 involved. There were various alternatives. If  
18 you -- what I was thinking and not saying to  
19 them was if you want to just avoid to the final  
20 moment potential penalty, which, in fact, could  
21 still turn out to be the death penalty or  
22 suspension of play, what you would do is you  
23 would opt to head toward the enforcement  
24 process and make Julie Roe and her staff go out  
25 and prove their case and see if they could do

1 it, even with the benefit of the Freeh Report  
2 and the identification of all the principles  
3 that are involved.

4 Or you could consider the  
5 possibility of a stipulated agreement, which  
6 was the word I used before for a summary  
7 disposition. And that in itself had some  
8 cumbersome issues in the enforcement program  
9 that had to be overcome. But if you're  
10 motivated to, you know, to get it done more  
11 quickly, then that's probably the place you  
12 would have to go.

13 Q. At that time, did you believe there  
14 were any other alternatives open to NCAA in  
15 terms of how it could proceed against Penn  
16 State?

17 A. I think at that time, the first  
18 call, I was limiting my thinking to only the  
19 enforcement-related options. So the stipulated  
20 agreement or the summary disposition case I  
21 think was the only thing that came to my mind.  
22 It was later that I came to other ideas about  
23 how to proceed.

24 Q. Did you believe at this point in  
25 time that if it chose to, NCAA had the

1 authority, legal authority under its rules, to  
2 act against Penn State?

3 MR. KOWALSKI: Objection to form.

4 Q. Forget the propriety of it; whether  
5 you had the authority to do it -- NCAA, that  
6 is.

7 A. It was my view that they did, yes.  
8 And I believed the executive committee could  
9 assume that authority if they wished to do so.

10 Q. Without, I don't think, a protracted  
11 meander into the bylaws, where is the  
12 authority, to your knowledge, within NCAA  
13 bylaws or its constitution or its rules or  
14 anywhere for the executive committee to take  
15 such a step?

16 A. Under the duties of the executive  
17 committee, it indicates that they may establish  
18 policies or take actions in matters that had  
19 association-wide impact. The Division II and  
20 III members of the executive committee were  
21 expressing the same dismay over the case and  
22 the same concern about intercollegiate  
23 athletics generally. So if the executive  
24 committee believed it important enough, they  
25 certainly had the ability to act. And they had

1 done so in a couple other cases.

2           They had earlier decided we would no  
3 longer conduct championships in South Carolina  
4 and Mississippi because they displayed the  
5 Confederate battle flag, for example. They  
6 also had decided we would not conduct any  
7 events in states that have gambling on  
8 intercollegiate events. They had indicated  
9 that and the cases where there are Native  
10 American mascots at institutions, that those  
11 institutions could not host any event.

12           So it certainly isn't unprecedented.  
13 And if they believed and I believe they  
14 thought this particular case was unprecedented  
15 as an attack on intercollegiate athletics that  
16 they were well within their rights to do it.

17           Q.     You cited three examples of times  
18 the executive committee has acted in the  
19 fashion that we're discussing it acted with  
20 Penn State.

21           A.     Right.

22           Q.     One related to the flying of the  
23 Southern Cross or the Confederate flag?

24           A.     The battle flag.

25           Q.     The second was refusing to have

1 certain events in states that allowed sports  
2 book?

3 A. Yes.

4 Q. Collegiate --

5 A. On intercollegiate events.

6 Q. And the third related to Native  
7 American mascots?

8 A. Yes.

9 Q. Would any of those three examples,  
10 could any of those three examples been  
11 addressed under NCAA's enforcement mechanism?

12 MR. KOWALSKI: Objection to form.

13 A. Probably not, no.

14 Q. You have said several times, I  
15 think, that Penn State's conduct could be  
16 addressed under the enforcement proceeding.  
17 Could, didn't have to be but could, right?

18 A. Yes.

19 Q. So can we agree that a distinction  
20 between the Penn State case and the other three  
21 you identified where the executive committee  
22 acted in the manner it did, is that only in  
23 Penn State's case is it one where the  
24 enforcement process could have been used?

25 MR. KOWALSKI: Objection to form.

1           A.       Well, that's an interesting way to  
2 put it because the executive committee, you  
3 know, seized, if you will, jurisdiction on the  
4 other matters from other committees. It just  
5 wasn't an enforcement issue. And so it's not  
6 unprecedented in the sense that they think this  
7 rises to the level to take it out of the other  
8 normal processes.

9                       But to the extent it was in the  
10 enforcement area, I think it probably is  
11 unique.

12           Q.       Do those other committees that would  
13 have been -- that would have had -- I know we  
14 hate the word jurisdiction, but I don't know a  
15 better one for this purpose -- the other  
16 committees that had jurisdiction over those  
17 other three issues, do those committees provide  
18 the same due process protections that the  
19 enforcement process does?

20                       MR. KOWALSKI:  Objection to form.

21           A.       I would say they would with regard  
22 to those kinds of issues.

23           Q.       Would they provide for a right of  
24 appeal?

25                       MR. KOWALSKI:  Objection to form.

1 A. I'm sure that they would, yes.

2 Q. Would they provide for an  
3 adversarial hearing?

4 MR. KOWALSKI: Objection to form.

5 A. Probably not necessarily related to  
6 an adversarial hearing, but it's certainly a  
7 collection of information or a sharing of  
8 information and notice that they were going to  
9 do that.

10 Q. If I ask you an annoying question  
11 and I know you're not going to want to answer,  
12 but I promise you after we can break for lunch  
13 for a couple minutes.

14 A. Go ahead.

15 Q. Can you name for me the three  
16 committees, if they are three, that would have  
17 addressed those other examples we've identified  
18 where the executive committee snatched the case  
19 away?

20 MR. KOWALSKI: Objection.

21 A. Championships cabinet in -- let's  
22 see.

23 Q. I'm sorry, I apologize. If you can  
24 tell me the committee and the issue so I can  
25 know which committee would be dealing with

1 which issue, that would be appreciated.

2 A. The Confederate battle flag and the  
3 Native American mascot would both be  
4 championships issue. Gambling still would have  
5 fallen, I think, in championships. What was  
6 the other one? Did I have three or four?

7 Q. Native American mascot.

8 A. Native American mascot was still  
9 conduct of our events, so that would still be a  
10 championships cabinet.

11 MR. HAVERSTICK: Let me make sure  
12 there's no more logical questions I can ask  
13 right now.

14 MR. KOWALSKI: I thought you made a  
15 promise.

16 MR. HAVERSTICK: I did make a  
17 promise. I'd like to take a half-hour  
18 because I would really like to be done by  
19 3:00 o'clock, and I think that's  
20 achievable. How much lunch do you want?

21 THE WITNESS: Fine by me.

22 (A lunch break was taken.)

23 BY MR. HAVERSTICK:

24 Q. Okay. Mr. Berst, back on the  
25 record. I have -- a couple of questions popped

1 into my head following on some of the ones we  
2 were talking about right before we broke.

3 A. I'm shocked.

4 Q. Actually, I am shocked. I'm not  
5 that deep of a thinker.

6 MR. KOWALSKI: Let's see how deep  
7 your thoughts are.

8 MR. HAVERSTICK: Mile wide, inch  
9 deep.

10 Q. Back to the four examples -- the  
11 three examples, beg your pardon -- we  
12 identified prior to the break in which the  
13 executive committee acted outside of the  
14 enforcement process. Those were to sum up:  
15 The Confederate battle flag situation, the  
16 sports book situation, and the Native American  
17 mascot situations.

18 In those actions taken by the  
19 executive committee, with respect to those  
20 three situations, those actions were not  
21 directed at members, were they?

22 A. Yes. The American -- the Native  
23 American mascots are directed at members. I  
24 think that's probably the one of those that is,  
25 yes.

1 Q. But was it an action against  
2 specific members, or did it have a general  
3 impact on all members? Do you see my point?

4 A. No. It affected only those that had  
5 American -- Native American mascots, and it was  
6 directed at them specifically.

7 Q. By name or just in general by class?

8 A. Name.

9 Q. Okay. So there was, in whatever  
10 matter, we would find that you would have  
11 executive committee action taken against  
12 however many member schools were deemed to have  
13 Native American mascots?

14 A. You'd have a chart of which ones  
15 they are and what the status of their mascot  
16 was and you would have, yes, specific actions  
17 related to them.

18 Q. How was that particular matter  
19 resolved?

20 MR. KOWALSKI: Objection to form.

21 A. It was resolved that we will not  
22 conduct events at those locations.

23 Q. Okay. Did any of those -- did that  
24 resolution or if they broke down into  
25 individual resolutions vis-à-vis an individual

1 member, did any of those involve an agreement  
2 between the member school and NCAA that bound  
3 both of them to not, for instance, have a  
4 mascot? Or was this instead, an imposed  
5 solution?

6 MR. KOWALSKI: Objection to form.

7 A. I don't know that I follow you  
8 entirely. There would be varying  
9 communications or processes, I suppose. And in  
10 some instances with the Native American tribes  
11 in the area related to their positions on what  
12 should occur in that particular instance. So  
13 there would be lots of possible options.

14 Q. Let me not be coy. In none of the  
15 other three situations, including the Native  
16 American mascots situation, were consent  
17 decrees involved similar to the one that was  
18 involved in the Penn State action?

19 MR. KOWALSKI: Objection to form.

20 A. Well, that would be one of the  
21 reasons why this line seems irrelevant to me,  
22 because that isn't the direction it went. You  
23 were looking for whether the executive  
24 committee had jurisdiction to act, and I do  
25 believe they do, with regard to an

1 association-wide issue. They could act in a  
2 variety of ways. And I don't recall anything  
3 being termed a consent decree in any other --  
4 in any of my dealings with institutions.

5 Q. No secret here. The point of my  
6 question to you is to distinguish that at least  
7 with respect to the use of a consent decree,  
8 Penn State is the -- the Penn State situation  
9 is similarly distinct from the other three  
10 because Penn State utilized a consent decree  
11 and, to your knowledge, the others didn't?

12 MR. KOWALSKI: Objection to form.

13 A. I think I'm agreeing with you. The  
14 Penn State matter was considered to be  
15 unprecedented, demanding action by the  
16 executive committee. And the form that that  
17 might take was considered and discussed in  
18 other settings. We haven't gotten to that, I  
19 guess, yet.

20 Q. Not yet.

21 Let me ask you a bylaws question. I  
22 believe I asked earlier to identify particular  
23 bylaws that authorized the executive committee  
24 to take what I would term ad hoc action, and I  
25 think you answered yes, and I don't remember

1 what the citation was?

2 MR. KOWALSKI: Objection to form.

3 A. I indicated ones that were set forth  
4 in the November 14 letter, I think, but I  
5 didn't include ethical conduct, which I noticed  
6 was in that letter but --

7 Q. But what --

8 A. -- that probably is an additional  
9 cite that could be used.

10 Q. To clarify for the record, what  
11 authority can you point to in the bylaws or  
12 rules and regulations that authorizes the  
13 executive committee to unilaterally and in an  
14 ad hoc fashion, address a situation that is  
15 believed to be of significant import?

16 MR. KOWALSKI: Object to form. If  
17 you want -- if you need to see the  
18 executive committee bylaws, go ahead.

19 Q. Yeah, go ahead.

20 A. I'm fine, because I'm the person who  
21 actually thought that it was appropriate not to  
22 head in the direction of the bylaw citations.  
23 The executive committee does indeed have the  
24 ability to act on any matter that it considers  
25 to be an association-wide issue. None of the

1 other three that we talked about cite a bylaw.

2           And so in this instance, if you  
3 believe that providing sanctuary to a pedophile  
4 under the noses and possibly through actions  
5 that permitted that kind of action for 15  
6 years, to be serious enough of an athletic  
7 issue to threaten intercollegiate athletics,  
8 the executive committee is the perfect and only  
9 group that ought to try to take an action.

10           Q.     Understanding that explanation,  
11 which I appreciate, can you point me to a bylaw  
12 or regulation that authorizes the executive  
13 committee to do what it did in the case of Penn  
14 State?

15           A.     And I would say to you it's set  
16 forth in the duties of the executive committee  
17 to address association-wide issues that affect  
18 the total association. They have the ability  
19 to take actions and adopt policies related to  
20 those matters.

21           Q.     Could you do me the kind service of  
22 taking a look at that and just saying where  
23 that comes from?

24           A.     It's in --

25           Q.     I believe you, I just want to have a

1 number.

2 A. -- executive committee duties and  
3 responsibilities. And it would be constitution  
4 4.1.2. And among the duties there are some A  
5 through M set of duties. And, "Act on behalf  
6 of the association by adopting and implementing  
7 policies to resolve core issues and other  
8 association-wide matters." That is the  
9 sentence that has been relied on in all of  
10 those cases that I suggested that the executive  
11 committee took action on.

12 Q. Was that M as in Mike, I'm sorry?

13 A. No, E.

14 Q. Okay. Did I hear you say that you  
15 specifically stayed away from an analysis early  
16 on regarding executive committee authority that  
17 pegged the authority to a particular bylaw?

18 MR. KOWALSKI: Objection to form.

19 A. I'm not sure the way you're stating  
20 it or whether I have adequately explained it.  
21 The citing specific bylaws and utilizing the  
22 infractions on an enforcement program in a  
23 couple different ways, either by a stipulated  
24 set of findings and the processes that ensue  
25 related to that, or going through the

1 allegation exercise, I thought to be  
2 exceedingly cumbersome, but available and  
3 anybody can go that way. And Penn State had  
4 that option.

5           If you were to opt to an action by  
6 the executive committee, in my view, the only  
7 way that was reasonable to approach is if the  
8 institution actually stipulated to some set of  
9 acts that it accepted responsibility for, which  
10 was the Freeh Report.

11           So if, indeed, the institution said  
12 we accept what's in the Freeh Report, we're  
13 going to implement all the recommendations of  
14 the Freeh Report, whether you can even cite a  
15 bylaw out of that, if the matter under inquiry  
16 related to the integrity of intercollegiate  
17 sport, I think the executive committee had the  
18 authority right then and there to consider  
19 action against Penn State.

20           Q.     I probably asked the question  
21 inartfully, and I'll get back to it in a  
22 second. But you said something of interest to  
23 me -- you've said a lot of interest to me.

24                     Was it necessary under your reading  
25 of the bylaws that for the executive committee

1 to act, it had to have the Freeh Report or  
2 something like it before it could take action?

3 A. It had to have some set of actions  
4 that the institution was willing to assume  
5 responsibility for.

6 Q. It couldn't take it in a vacuum? It  
7 required something that, as you said, the  
8 institution that was identified as a fact, that  
9 the institution could have, in effect, own or  
10 take ownership of?

11 MR. KOWALSKI: Objection to form.

12 A. Well, that sort of heads into the  
13 speculative area, because I didn't have that.  
14 You know, by the time I got interested in how  
15 you might be able to process this matter, we  
16 knew that the institution had basically  
17 accepted the Freeh Report and was going to  
18 implement its recommendations. And if that was  
19 the case, then that to me could serve as the  
20 vehicle for action to be taken by the executive  
21 committee. And that to me would take a quicker  
22 approach than to simply handle it by summary  
23 disposition through infractions, which is one  
24 of the conversations that Gene Marsh and I had,  
25 of the various alternatives, how can this be

1 handled. And the nature of that conversation,  
2 those conversations from my perspective is:  
3 Here's fast, here's slow, here's what can avoid  
4 possible penalties at the end, here's what  
5 probably will happen the other way. And at  
6 least it gives some latitude for the executive  
7 committee to consider actions.

8 Q. True or false: Did you or anyone  
9 else prior to the acceptance of the consent  
10 decree, articulate the executive committee's  
11 power to enter into the consent decree and  
12 resolve the Penn State matter in the way it did  
13 in terms of these particular statutory  
14 sections? And I'm pointing to the sections  
15 that Mr. Berst just referenced.

16 MR. KOWALSKI: So let me object to  
17 the form of the true or false question.  
18 Also, you can go ahead, but I just caution  
19 you not to reveal privileged  
20 communications, to the extent it comes up  
21 at all.

22 A. And I can't do it true or false.

23 Q. Okay.

24 A. Because I don't know precisely the  
25 sequence of those calls and meetings. But I,

1 yes, was the person who indicated that in my  
2 view, this was a way that this could be  
3 processed.

4 Q. And you did so prior to the time  
5 that the consent decree was entered into?

6 A. I don't know the answer to that. I  
7 think I would have had to have assurance that  
8 there was such a consent decree and it was  
9 acceptable to be thinking that way. But I  
10 would have -- I would have recognized the  
11 possibilities even before that.

12 Q. Tell me, is there anything in the  
13 bylaws that articulates when it is appropriate,  
14 in an objective way, for the executive  
15 committee to take control of a particular  
16 matter, be it enforcement or otherwise?

17 MR. KOWALSKI: Object to form.

18 A. I don't know that you could do that  
19 other than by simply past practices and whether  
20 there were objections from the membership  
21 following actions by the executive committee.

22 Q. So there's nothing, there's nothing  
23 that one could look to. Let's say there was a  
24 hypothetical challenge to the executive  
25 committee's authority to resolve a matter in

1 the way we've been talking about for the past  
2 minutes.

3 MR. KOWALSKI: Is that a  
4 hypothetical?

5 MR. SEIBERLING: Of course it is.

6 MR. KOWALSKI: I said is it or not a  
7 hypothetical.

8 MR. SEIBERLING: That's true, yeah.

9 Q. Where would one consult in the  
10 NCAA's rules to cite to authority that  
11 you've -- executive committee, you took this  
12 properly or executive committee, you did not  
13 take it properly?

14 A. You would do that at the next  
15 convention. So that would be in January  
16 following whenever the action might have taken  
17 place.

18 Q. So there's no objective standard  
19 that we can find in there; it really is a look  
20 back to see, well, that one seems right and we  
21 were right to do it there?

22 MR. KOWALSKI: Object to form.

23 Q. Is that what you're saying?

24 A. Well, no. The institution or  
25 someone could file a specific objection to an

1 action that's taken and leave to the membership  
2 at least the opportunity to say that's in  
3 order, not in order, or appropriate for the  
4 executive committee to do.

5 Q. Understood. But there's no rule  
6 that that challenging member could cite to, to  
7 show this was -- this rule articulates when the  
8 executive committee may appropriately take  
9 control, this is when it may not?

10 A. They would cite exactly what I cited  
11 before, constitution 4.1.2 little E. They  
12 would say -- in this instance, they would say  
13 the executive committee acted improperly by  
14 utilizing that authority to take any action  
15 related to Penn State.

16 Now that seems a little inartful in  
17 the sense that Penn State agreed with that at  
18 the outset. So Penn State said they accepted  
19 the consent decree. They accepted whatever it  
20 was the NCAA was going to do in response.

21 Q. Am I right, then, that it is only  
22 the section that we are talking about,  
23 subsection E, that gives any guidance on the  
24 propriety of the executive committee assuming  
25 control? There is no other section that

1 addresses the executive committee's authority  
2 to pull matters away from where they normally  
3 would be adjudicated?

4 MR. KOWALSKI: Objection to form.

5 A. That's where I would go. There may  
6 be other executive committee policies in regard  
7 to reporting responsibilities to the membership  
8 at the convention, but I can't think of  
9 anything in particular that would call that  
10 into question there.

11 Q. When you reviewed, as you did at  
12 some point, the propriety of the executive --  
13 of the executive committee's actions with  
14 respect to Penn State, did you reference or  
15 consult any other sections of the bylaws other  
16 than the one we've been discussing for the past  
17 couple of minutes?

18 MR. KOWALSKI: Objection to form. I  
19 mean, I don't know what review the  
20 propriety means.

21 A. My analysis was to find a way that  
22 Penn State and the NCAA could move forward  
23 together and this was the road that seemed to  
24 be the quickest to get that accomplished. So I  
25 didn't give it further analysis, no.

1 Q. Okay. Let's now turn -- well,  
2 actually, no, because I'll forget.

3 A. You know, I should say I did do all  
4 of that. But at the same time, I made clear  
5 what all of the other options are to resolve  
6 this matter. So yes, this is the fastest. I  
7 also explained what the slowest.

8 Q. To?

9 A. To Gene Marsh.

10 Q. To Gene Marsh. Did you give that  
11 explanation and presentation to your colleagues  
12 on the phone calls that we know happened  
13 between the 12th and the 17th?

14 MR. KOWALSKI: Objection. If you  
15 did that in the executive committee call,  
16 you can answer.

17 A. I did not exhaustively, no, I don't  
18 believe I did.

19 Q. Did you privately with any one of  
20 your colleagues, express what you then later  
21 apparently expressed to Gene Marsh about we  
22 could do it this way, we could do it that way,  
23 we could do it a third way?

24 MR. KOWALSKI: Obviously be careful  
25 not to reveal privileged conversations with

1 legal counsel.

2 A. I would have made that information  
3 known in some setting with the president of the  
4 association.

5 Q. Do you recall a specific instance in  
6 which you did so?

7 MR. KOWALSKI: Objection. Well --

8 A. I would guess --

9 MR. KOWALSKI: Hold on one second.

10 THE WITNESS: Sorry.

11 MR. KOWALSKI: If it's in a setting  
12 where it's a meeting or discussions  
13 involving legal counsel, I have to ask you  
14 not to answer the question.

15 A. I can't answer the question.

16 Q. You can't answer the question  
17 because it was in the context of you providing  
18 information that would have led to this  
19 provision of legal advice?

20 MR. KOWALSKI: I don't know if he  
21 can answer that question, but we certainly  
22 have and the others have as well.

23 Q. Do you have a specific recollection  
24 of giving this information in a setting in  
25 which both Dr. Emmert and Mr. Remy

1 participated?

2 MR. KOWALSKI: Can you hold on one  
3 second, please, before you ask the  
4 question? I just want to consult about  
5 this. We're going to take a break in the  
6 hall just to make sure we know what the  
7 answer is from a privilege standpoint.

8 MR. HAVERSTICK: That's fine.  
9 Meanwhile, I'm going to -- go ahead.

10 (A short break was had.)

11 BY MR. HAVERSTICK:

12 Q. All right. I'm going to show you --  
13 oh, wait. We had a question. Can you answer  
14 the question yes or no, whether you  
15 participated in conversations with Mr. Emmert  
16 and Mr. Remy on that issue? And I don't  
17 remember what the issue was anymore.

18 MR. KOWALSKI: Well, if the issue is  
19 specifically the executive authority --  
20 because I think the way you asked the  
21 question before the break, based on our  
22 understanding of the context of the  
23 question, we have to instruct him not to  
24 answer on privileged grounds.

25 MR. HAVERSTICK: Are we establishing

1           that these conversations did happen with  
2           Mr. Remy in the room, or is it a  
3           conversation between the witness and  
4           Mr. Emmert only?

5           A.       It's not the latter. It involves  
6           Donald Remy as well.

7                     MR. KOWALSKI: Involves counsel.

8                     MR. HAVERSTICK: But involves as in  
9           he's there talking to -- if the answer is  
10          yes, I can move on. I'll take your, I will  
11          accept your representation.

12          Q.       But the conversation that we are  
13          discussing with Mr. Emmert, was Mr. Remy either  
14          on the phone or in the room as a part of that  
15          conversation?

16          A.       Yes.

17                     (Berst Exhibit Number 12 marked for  
18                     identification.)

19          Q.       Okay. I'm going to show you a  
20          document we marked, Berst 12, and this is just  
21          a little cleanup. And I hate to harp on this,  
22          but I'll forget. Take your time with that,  
23          please. But I'm really only interested in the  
24          top email from you to --

25                     MR. KOWALSKI: But you can read the

1 whole thing.

2 Q. Yeah, if you want to, go ahead.

3 MR. KOWALSKI: I think you might  
4 want to.

5 A. Okay. I've read this.

6 Q. Again, I don't want to get -- who is  
7 Ms. Viverito?

8 A. She's the commissioner of the  
9 Missouri Valley Football Conference.

10 Q. You and she are corresponding about  
11 the email you sent on Monday, July 23?

12 A. I sent a more complete memo to all  
13 of the 32 conference commissioners association  
14 members.

15 Q. Why did you send that memo?

16 A. It was an update from me on status,  
17 as I understood it, at that point, related to  
18 Penn State matters. It was going to be quite  
19 public for everyone, and I at least wanted them  
20 to have some sense of what was going on in the  
21 matter and where -- how I was thinking about  
22 it.

23 Q. You drafted that email?

24 A. I wrote that email, yes.

25 Q. Okay. Did anyone assist or edit it

1 for you?

2 A. No.

3 Q. I am going to direct your attention  
4 to the very top email, the last in the chain,  
5 in temporal terms. "My early opposition was  
6 more re: Jurisdiction."

7 We spoke early on, and I believe the  
8 reason I used the word jurisdiction is that I  
9 recalled it from an email, and then I went and  
10 found the email. Does this email reflect or --  
11 let me ask it this way: Reading this email,  
12 does it cause you to remember that, in fact,  
13 you characterized your early opposition to the  
14 process that was used to adjudicate Penn  
15 State's punishment as one related to  
16 jurisdiction?

17 MR. KOWALSKI: Objection. Form.

18 A. I think during the day, you've been  
19 using jurisdiction differently than I have.  
20 And I didn't mean in terms of something being  
21 impossible. But I was questioning the  
22 direction of heading down an enforcement  
23 process. So to me, that word that I used was  
24 jurisdiction. I've later explained to you all  
25 kinds of ways that you could process this case.

1 So I believe there's jurisdiction in all of  
2 those places. We can go back and pick them  
3 out.

4 Q. I got it. I think. I think I have  
5 it.

6 A. Okay.

7 Q. Your use of the word jurisdiction  
8 should not be taken to mean that you believed  
9 or believe that NCAA had no authority to act in  
10 this particular circumstance?

11 A. In fact, so far you haven't  
12 identified any area where it could not act, in  
13 my opinion.

14 Q. Okay. Your use of the word  
15 jurisdiction in this email relates to your  
16 concern about the propriety of the enforcement  
17 process versus some other NCAA process?

18 MR. KOWALSKI: Objection to the  
19 form.

20 A. I don't want to say propriety. All  
21 kind of different people have different views  
22 of that.

23 Q. Use your words.

24 A. All I was saying was that I was  
25 questioning the thinking about how to process

1 the matter at that time.

2 Q. And --

3 A. And I thought there were other ways  
4 to think about it.

5 Q. And at that time, were you thinking  
6 an other, perhaps better, way was the  
7 enforcement process; or were you thinking it  
8 should be some other process?

9 MR. KOWALSKI: At what time do you  
10 mean?

11 A. This is, as I understand it, the  
12 very beginning, the first conversation we have.

13 Q. The very beginning, yeah, yeah.

14 A. In my mind, I was thinking about  
15 processes that involved no action at all by  
16 anybody to -- actions by the executive  
17 committee, actions by the enforcement program.  
18 Although the subject at the time, I think was  
19 limited to enforcement program. I don't think  
20 anybody else was thinking about other  
21 possibilities.

22 Q. Okay. And at that early time, was  
23 your thinking on the -- what was your  
24 opposition, rather, premised on the idea that  
25 the criminal process should play out first

1 before an enforcement process is invoked or  
2 utilized?

3 MR. KOWALSKI: Objection. Form.

4 A. Well, there was much more to that.  
5 I didn't want to limit this to some sort of an  
6 enforcement process. I wanted to leave the  
7 door open to consider any kind of process or  
8 none, which I think hopefully led to the letter  
9 from the president that did not do any more  
10 than simply express his own curiosity under  
11 these kind of bylaws, respond to me,  
12 institution, and then we'll make another  
13 evaluation of this matter and figure out what  
14 to do next.

15 Q. Was your option then to the idea  
16 that there needed to be action at that time at  
17 all? In other words, early on, was your  
18 consideration that NCAA should wait and see  
19 what happened and then decide on the course to  
20 evaluate or adjudicate the issue?

21 MR. KOWALSKI: Objection to form.

22 A. I really was trying to react, I  
23 think to what I was hearing in the room about  
24 possible options. And I was opposed to heading  
25 down the direction of the enforcement process

1 at that juncture. So I was simply trying to  
2 keep it open.

3 Q. Okay. While we have -- we'll just  
4 get this out of the way. Flip to the next  
5 page, please. I am looking at the first  
6 paragraph, not the first full paragraph, and  
7 the second line, first full sentence: This was  
8 not a negotiation.

9 That appears to be a reference to  
10 the executive committee's acceptance of a  
11 consent decree; is that right?

12 MR. KOWALSKI: Objection to form.

13 A. I think, it appears to me that's  
14 related to the consent decree.

15 Q. I mean, yeah, take your time to  
16 review the full paragraph, if you wish.

17 A. And I note on the previous page, I  
18 make the same reference that I just did on  
19 executive committee jurisdiction, which then  
20 permitted the staff to develop a set of  
21 conclusions based on the Freeh Report and the  
22 Sandusky trial, as well as penalties, subject  
23 to executive committee and signoff by the  
24 president of Penn State.

25 Today, I can't tell you whether I

1 was thinking any more broadly than what turned  
2 out to be a consent decree. I don't know  
3 that -- yeah, by this time, I wouldn't know  
4 that term, probably.

5 Q. As you sit here today, do you still  
6 characterize -- no, that's not how I want to  
7 ask that question.

8 Do you agree as you sit here today,  
9 that there was no negotiation between NCAA and  
10 Penn State University over the consent decree?

11 A. I don't know how necessarily that  
12 word plays in the legal system. The penalties  
13 that were arrived at and forwarded to the  
14 institution were simply reported. There  
15 wasn't -- and Gene Marsh was very good about  
16 not doing anything except taking them down,  
17 except when I reported one conversation that  
18 changed. In the next 24 hours, he got a little  
19 mad about that, which I understand. But that  
20 wasn't a negotiation. He was just making  
21 noise.

22 And there certainly were times when  
23 in drafting, he would have said, while you're  
24 drafting, understanding our people are  
25 drafting, he might offer comments or can you

1 ensure that this kind of point is made or not  
2 made. The decision being ours. Now, I don't  
3 know whether you call that negotiation or not.  
4 To me, it was not.

5 Q. And this email was written at  
6 roughly the time that the consent decree was  
7 entered into between Penn State and the NCAA?

8 A. This would have been the end. I  
9 wouldn't talk to CCA members until it's  
10 happening.

11 Q. And you have no reason to think that  
12 this didn't accurately reflect your thinking at  
13 the time about negotiation or lack of  
14 negotiation with Penn State?

15 A. Well, I've tried to explain to you  
16 what may be some legal distinction between  
17 negotiation and my term negotiation in here.  
18 And having said that, that's still my position.

19 Q. Okay.

20 A. I can repeat, I think --

21 Q. Nope.

22 A. -- the answer I gave.

23 MR. KOWALSKI: And it also might be  
24 fair, we can or can't, but to read the next  
25 sentence after: This was not a

1 negotiation. Which states: The NCAA  
2 established the penalties and absent the  
3 signature of the president, the matter  
4 would have been referred to the more  
5 cumbersome enforcement process. Just so  
6 the record has the full language.

7 MR. HAVERSTICK: Sure.

8 Q. Before we move on, the final  
9 paragraph, I'm sure you can guess the clause:  
10 I am now comfortable with the process here. I  
11 was opposed early on.

12 The process to which you refer is  
13 the executive committee disposition of the  
14 Sandusky matter?

15 A. The -- well, to me both the  
16 executive committee and Penn State's  
17 disposition.

18 Q. Okay.

19 A. I think both agreed that this was  
20 the way to put it behind them and to get on  
21 with working on things like integrity  
22 agreements and putting in place appropriate  
23 controls to avoid this kind of problem.

24 Q. What caused you to become  
25 comfortable with the process?

1           A.       Let me think about that a little bit  
2 as that occurred. I think for me, it was the  
3 interest of the institution to try and move  
4 forward.

5           Q.       The institution of?

6           A.       Penn State.

7           Q.       Okay.

8           A.       There was interest in whether there  
9 is a way, was a way to avoid what I called the  
10 hard slog of the enforcement program, which I  
11 said would, in fact, be imposed or would be  
12 implemented if this didn't work. Recognizing  
13 that there was no assurance on either side,  
14 whether that would be concluded in a manner  
15 that could -- would, I guess would result in  
16 the death penalty. I suppose if you ran  
17 through that process and understood it enough,  
18 you'd know that there's so many issues related  
19 to direct information and requirements for  
20 development of information, that it would have  
21 been very difficult over a long time to get  
22 that accomplished.

23                   And still, you had presidents and  
24 others who were basically saying this case is  
25 one in which the death penalty ought to be

1 applied, the so-called death penalty. And to  
2 me, this looked like the most appropriate way  
3 to move forward. If you both want to put it  
4 behind you, you want to begin to build a new  
5 culture. And if the penalties that are  
6 ultimately imposed are acceptable to all  
7 parties.

8 Q. You agreed as a matter of NCAA  
9 bylaws that the death penalty or suspension of  
10 play could have been applied to Penn State as a  
11 penalty had it gone through the enforcement  
12 process?

13 A. Yes.

14 Q. And why?

15 A. Because I believe that. The final  
16 decision would have been left to the committee  
17 on infractions. But to that point, I don't  
18 know if I had heard anyone other than maybe  
19 Mark Emmert and Judy Genshaft say that anything  
20 other than a so-called death penalty should be  
21 applied. And that came from public, CCA  
22 members, presidents, anyone I would have talked  
23 to during that particular time in history.

24 Q. Did your comfort with the process --  
25 well --

1           A.       I wasn't comfortable with the  
2 process.

3           Q.       Explain that, please. Tell me why  
4 you weren't comfortable with the process.

5           A.       Well, I'm never comfortable in  
6 matters that are that concerning to all the  
7 parties involved. So there's always going to  
8 be some level of discomfort. I try to put  
9 myself in the position of all of the people who  
10 are going to be affected as well.

11          Q.       Were you -- I'm confused, because  
12 you do write that: I am now comfortable with  
13 the process.

14          A.       Process is the operative word there.

15          Q.       Okay. Your comfort with the process  
16 as opposed to perhaps the outcome or the  
17 circumstances, was that engendered by the  
18 result that was it reached between NCAA and  
19 Penn State?

20                   MR. KOWALSKI: Objection to form.

21          A.       That certainly was a contributing  
22 factor. I think the fact that the NCAA and the  
23 institution were in agreement over the  
24 institution taking responsibility for certain  
25 acts and leaving the opportunity then to

1 develop appropriate penalties to address those  
2 acts, seemed to me to be an appropriate  
3 process.

4 Q. Were there any other factors that  
5 caused you to become comfortable with the  
6 process, other than that one?

7 A. I --

8 Q. That you recall?

9 A. I don't remember that day or what  
10 else I was thinking, no. There may well be,  
11 but I don't know.

12 Q. Let's turn to your negotiations with  
13 Gene Marsh. First --

14 A. There were no negotiations.

15 Q. Okay.

16 A. Now --

17 Q. You used --

18 A. I described earlier --

19 Q. You're doing my job for me.

20 A. -- what that word meant to me.

21 Q. And I appreciate your description.  
22 Let's call it your interaction with Gene Marsh  
23 that led to the consent decree. First, tell me  
24 who Gene Marsh is.

25 A. Gene Marsh is an individual who at

1 one time, was the faculty athletic  
2 representative at the University of Alabama.  
3 He would have participated in an infractions  
4 case that I was a party to when I was head of  
5 the NCAA long ago, and became the faculty  
6 representative who followed a faculty  
7 representative who was actually implicated in  
8 an earlier case.

9 Q. I beg your pardon, what case was  
10 that?

11 A. University of Alabama. I don't know  
12 what, 1990 something. And he subsequently  
13 became a member of the committee on  
14 infractions, which was the peer group I  
15 described to you before, that acts as the, in  
16 our system, the judges of the infractions  
17 cases. And they hear all the information  
18 presented by the enforcement staff and  
19 institutions and individuals who are involved  
20 in those matters. So they make findings of  
21 fact and impose penalties, to the extent those  
22 are warranted.

23 He, subsequent to that time, became  
24 involved in private practice and has  
25 represented, I think some institutions probably

1 who participated in the infractions process  
2 since he had some expertise in that area.

3 He was then hired by Penn State to  
4 assist them in the consideration of this case.  
5 I became aware of that around whenever we had  
6 our first conversation, whatever that is. And  
7 that probably brings Gene Marsh's bio  
8 up-to-date as far as I'm concerned.

9 Q. Do you know how Gene Marsh came to  
10 represent Penn State? And let me ask -- no,  
11 I'll ask it a more direct way.

12 Do you know whether Gene Marsh was  
13 recommended to Penn State by anyone at NCAA?

14 A. I don't know that.

15 Q. Have you heard that?

16 A. I have not heard that. I don't know  
17 that.

18 Q. When do you recall your first  
19 interaction with Gene Marsh on this matter?

20 A. Well, it's going to be July, some  
21 day when I'm on a call with him.

22 Q. I'm going to try to get the date  
23 narrowed down for us. Please hold.

24 A. You're right. There was some -- I  
25 don't think I had talked to him until he had

1 gotten back from that trip in Maine. I don't  
2 recall when that was.

3 Q. Is that your recollection, his first  
4 contact with NCAA was during his vacation in  
5 Maine, and that was when he reached out to you  
6 or Mr. Remy?

7 A. I'm not sure. At least I'm thinking  
8 the university reached out to him when he was  
9 in that location. And it was immediately  
10 thereafter that I would have had a conversation  
11 with him.

12 Q. How did you know that the university  
13 reached out to him at around that time, I mean  
14 when he was in Maine?

15 A. I don't know that firsthand. I  
16 think I got it out of the same article you're  
17 looking for.

18 Q. There's -- we'll move on, because if  
19 it we find it, we'll find it and maybe it  
20 doesn't really matter.

21 MR. HAVERSTICK: Mark for  
22 identification 26, Tab 26. And that is  
23 Berst 13.

24 (Berst Exhibit Number 13 marked for  
25 identification.)

1 Q. Now, overall, once Gene Marsh became  
2 involved -- and I'll hand you that first. Go  
3 ahead, look at that first and then I'll ask my  
4 question.

5 A. Okay. I see this.

6 Q. Okay. In general -- and we'll go  
7 through the dates so maybe we'll be able to be  
8 even precise, is it accurate that the time in  
9 which NCAA was interacting with Gene Marsh in  
10 the process that led to the consent decree was  
11 fairly compressed?

12 MR. KOWALSKI: Objection to form.

13 A. From my perspective, it was -- there  
14 were probably no more than a couple-week  
15 period.

16 Q. Is that in your -- with that  
17 recollection, is that unusual in terms of  
18 resolving -- I can't call it an enforcement  
19 situation because it's not an enforcement  
20 situation, but a matter in which NCAA wants to  
21 impose discipline?

22 MR. KOWALSKI: Objection to form.

23 A. Yeah, that's, I think just a  
24 nonsensical question. Because there's -- this  
25 whole matter in many ways is unprecedented --

1 Q. And that's why is it nonsensical --  
2 I'm sorry to interrupt. I just want to make  
3 sure I get it. It's nonsensical because  
4 there's no -- we can't benchmark what happened  
5 with Penn State against anything else that is  
6 in NCAA's can, is that --

7 MR. KOWALSKI: Objection to form.

8 A. The matters with which I would have  
9 been involved in previously that might be  
10 handled more quickly would have been an  
11 enforcement process, which I was describing I  
12 was interested in avoiding, even in the summary  
13 disposition approach.

14 So what we were encountering was a  
15 report that was delivered to the institution.  
16 And my -- I think if there's some explanation  
17 of speed, it had to do with the university's  
18 reaction to whatever that report said.

19 Q. I'd like to lay a little foundation  
20 for the interaction with Gene Marsh, just so  
21 we're doing this in some sort of logical sense.

22 After the Freeh Report, is it the  
23 case that President Emmert called Penn State  
24 President Erickson and indicated that NCAA was  
25 contemplating some action against Penn State

1 University?

2 MR. KOWALSKI: Objection to form.

3 A. I don't know the substance of the  
4 calls that may have occurred. I believe that  
5 Mark Emmert had communications with President  
6 Erickson during the same time I was having  
7 conversations with Gene Marsh.

8 Q. Well, would that have been -- would  
9 those conversations with President Erickson  
10 necessarily had to have been before Gene Marsh  
11 was retained, simply because Penn State would  
12 not have known to hire a lawyer with NCAA  
13 expertise until it was informed that NCAA was  
14 contemplating action?

15 MR. KOWALSKI: Objection to form.

16 MS. DOBLICK: Objection.

17 A. I don't have an answer to that  
18 question, no. I don't know.

19 Q. In the early conversations that  
20 occurred between July 12 and July 17, both  
21 among the executive committee and the, I call  
22 it the working group. We agreed that's not  
23 really what it was, but that's my shorthand for  
24 it. Was it established in that time frame that  
25 there was going to be action taken by NCAA

1 against Penn State of some nature?

2 MR. KOWALSKI: I just caution you  
3 not to reveal privileged communications.

4 Are you asking -- if you have to get  
5 into the details of discussions with  
6 counsel, let me know.

7 A. There certainly was attention to  
8 this matter is going to be processed in some  
9 fashion. So there would have been discussions  
10 again about process that might take place.

11 Q. But was it decided during that time  
12 frame that there would be a process and it  
13 would be applied to Penn State?

14 MR. KOWALSKI: So like did the NCAA  
15 as an organization make that decision  
16 basically?

17 MR. HAVERSTICK: Exactly.

18 MR. KOWALSKI: You can answer that  
19 question.

20 A. And I believe the answer to that is  
21 yes, but I'm basing that more on even the call  
22 with the executive committee board of directors  
23 wherein presidents were expressing the notion  
24 that something is appropriate here and you need  
25 to do more than simply, you know -- well, you

1 need to do more with regard to Penn State.

2 Q. In that call, if you remember, did  
3 President Emmert first suggest to the executive  
4 committee that he believed action should be  
5 taken by NCAA, or did the executive committee  
6 express first we believe action should be taken  
7 against Penn State?

8 A. I don't know the answer to that.  
9 The call would have been led by Ed Ray. I  
10 don't know what the question was or who  
11 started.

12 Q. Okay. Did both President Emmert --  
13 well, I know the answer is yes, I think, for  
14 the executive committee. And the executive  
15 committee expressed a desire to move forward  
16 with some action against Penn State, correct?

17 A. Yes.

18 Q. Did Dr. --

19 A. At least individually. I don't know  
20 that there was a vote taken.

21 Q. Okay.

22 A. But the sense of the group was  
23 something needs to occur further. And Mark  
24 Emmert, continue thinking about this, do more.

25 Q. Did Dr. Emmert, regardless of who

1 said it first, did Dr. Emmert similarly  
2 express, yes, we should do something against  
3 Penn State?

4 A. I don't know if he used those words.

5 Q. The --

6 A. As far as I'm willing to go is that  
7 the president of the association agreed that he  
8 would follow up further on this matter and  
9 consider possible alternatives, consider what  
10 to do next.

11 Q. Did you --

12 A. And he would, I think, indicate -- I  
13 think he indicated that he would be in contact  
14 with Penn State directly.

15 Q. Was it your understanding as a  
16 result of or after that phone call, that  
17 Dr. Emmert also intended to move forward  
18 against Penn State with some action, whatever  
19 that might be?

20 MR. KOWALSKI: Objection to the  
21 form.

22 A. And I can't go that far at that  
23 juncture. I don't know what his mindset was.

24 Q. Okay. You don't remember him  
25 expressing --

1           A.       All I knew was he was going to make  
2 a phone call, I believe, to Penn State. I  
3 don't know what the substance would be.

4           Q.       Were you ever briefed on the  
5 substance of that phone call between -- the  
6 phone call between Dr. Emmert and Dr. Erickson?

7           A.       I don't think at that time, no.

8           Q.       Do you recall ever being briefed on  
9 it?

10          A.       Not briefed. I think later, I must  
11 be aware of a phone call confirming that the  
12 consent decree had been essentially approved.

13          Q.       I'm talking about the very first  
14 communication between Dr. --

15          A.       Yeah, and I don't know what those  
16 were.

17          Q.       You don't know. That's fair enough.

18                   And I may nail down when that call  
19 happened. But I think for our purpose, we can  
20 agree that that phone call would have happened  
21 after the executive committee individually and  
22 then sort of collectively expressed a desire to  
23 do something with respect to Penn State and  
24 Mark Emmert indicated, yes, I will do  
25 something?

1 MR. KOWALSKI: Objection to form.

2 A. You asked me that and I told you I  
3 wouldn't go there with you. All I said was the  
4 president was going to make a follow-up call to  
5 Penn State. Now, you tried to characterize it  
6 as him doing something. I'm not willing to say  
7 that. So quit asking me that.

8 Q. I'm not trying to characterize it in  
9 any way, I'm trying to establish it temporally.  
10 We can --

11 A. Then use different words.

12 Q. All right. If -- you know, let me  
13 just ask what I'm trying to get at. I'm trying  
14 to establish a timeline. Because I know  
15 earlier on you were concerned about specific  
16 dates and making sure the dates were right.  
17 And that's really the only purpose of this.  
18 It's not to characterize who said what in a  
19 phone call.

20 To your knowledge, was it after the  
21 phone call, the first call between president  
22 Erickson and Dr. Emmert, that Gene Marsh  
23 reached out and contacted NCAA?

24 MR. KOWALSKI: Objection to form.

25 A. I don't know the timing.

1 Q. Okay. We haven't nailed down the  
2 date and we'll move on from when the phone call  
3 to Gene Marsh was from Maine. But that is, to  
4 your knowledge, the first time that Gene Marsh  
5 reached out to NCAA?

6 A. I don't recall specifically whether  
7 he was in Maine or leaving Maine or even at the  
8 institution. But my recollection is that he  
9 was heading back to the institution and that he  
10 would be having some conversation with whoever  
11 was appropriate to have conversations with at  
12 the NCAA. And I don't recall specifically  
13 where I have that recollection from, but I knew  
14 that Gene Marsh was going to be representing  
15 the institution.

16 Q. You testified earlier today that you  
17 desired to participate in the process that  
18 ended up involving Ed Ray and Gene Marsh; is  
19 that right?

20 MR. KOWALSKI: Objection to form.

21 A. No. I may have said that I inserted  
22 myself into the process when I understood that  
23 Gene Marsh was going to be representing the  
24 university.

25 Q. Why?

1           A.       Because I considered Gene Marsh to  
2       be exceptionally familiar with NCAA processes  
3       and bylaws and the like, and he had represented  
4       a number of institutions. And I didn't have  
5       the same confidence, frankly, in any of our  
6       people. And I thought I could help because  
7       both I understand the NCAA processes, how they  
8       operate, where the authorities are, and because  
9       I believe that Gene Marsh would believe me to  
10      be a credible source of information.

11          Q.       Did you -- do you include Mr. Remy  
12      in the group of individuals you feel, I can  
13      read it back, I don't want to characterize --

14          A.       No, I'll answer the question.

15          Q.       Is he in that group of folks who has  
16      a less superior knowledge of the bylaws than  
17      you do?

18          A.       In my opinion, yes.

19          Q.       That's fine.

20                    Were you asked by Mr. Remy or  
21      Mr. Emmert or anyone else to participate?

22          A.       I asked if I could participate. And  
23      the answer was that, fine, yes.

24          Q.       Who did you ask?

25          A.       I think I asked Mark. I think it

1 was Mark Emmert.

2 Q. Do you recall -- I think you said  
3 and testified that you made this request after  
4 you were aware that Gene Marsh was in the mix;  
5 is that right?

6 A. Yes.

7 Q. So this conversation, was it a  
8 conversation? Or was it via email with  
9 Dr. Emmert?

10 A. It was a conversation.

11 Q. Did you -- were you told in this --  
12 and was it between you and Dr. Emmert only?

13 A. I think there were more people  
14 involved. I don't recall Donald. I recall, I  
15 think, Julie, Kevin Lennon, you know, the same  
16 sort of group of people that you were talking  
17 about.

18 Q. Do you recall Dr. Emmert expressing  
19 what the goal of the interaction with Gene  
20 Marsh was?

21 MR. KOWALSKI: And just to confirm,  
22 this is not a meeting that involves  
23 Mr. Remy? We agree, then, it's not -- the  
24 purpose of this meeting is not to provide  
25 or receive legal advice, is that your

1 understanding?

2 A. I think I'm still in that category  
3 at that point. My -- I didn't receive  
4 instruction. I just indicated that -- the  
5 reasons that I set out, I wanted to be involved  
6 in those conversations. And that I thought of  
7 anybody on our staff, I'd be able to think  
8 through options as well or better than anybody  
9 present.

10 Q. In that initial discussion with  
11 Dr. Emmert, did anyone raise the notion that  
12 the outcome of the discussion with Gene Marsh  
13 would be a consent decree with Penn State?

14 MR. KOWALSKI: Objection to -- just  
15 caution you not to reveal any legally  
16 privileged communications to answer the  
17 question.

18 Q. This is a conversation that didn't  
19 have Remy in the room.

20 A. And I don't recall the timeline of  
21 how there ended up being the consent decree.  
22 That's not my term. So that doesn't come from  
23 me. So I don't have that recollection. I just  
24 wanted in so that I could make sure that  
25 wherever it is -- wherever we went in terms of

1 processing this case, that I could believe we  
2 had the authority and ability to do it.

3 Q. You said of course, and you said  
4 this a few times, you wanted in. What was your  
5 understanding of the goal of what you were  
6 getting in?

7 A. I wanted to help in the conclusion  
8 of issues around Penn State at that point. You  
9 still had an outstanding letter that had been  
10 sent by the president of the association. You  
11 had the Freeh Report that had just been  
12 completed. You still had the cry of basically  
13 everyone in the public about how horrible this  
14 whole thing is, the NCAA needs to take action.

15 I assumed at least that there would  
16 be further considerations along those lines,  
17 and I wanted to be part of helping to make sure  
18 it was a reasonable and appropriate process.

19 Q. You understood when you spoke with  
20 Dr. Emmert that at that point, NCAA planned to  
21 take action against Penn State of some nature?

22 A. Well, I don't know that I had  
23 that -- I don't know who from. But my sense  
24 was from all of those reasons that I stated  
25 earlier, I thought this is going to be

1 processed further. And Gene Marsh is going to  
2 be a party to assisting the university in going  
3 forward. There would be communications with  
4 NCAA. And whatever those were, I want to be a  
5 part of them.

6 Q. Was it your understanding at that  
7 time and at that initial discussion with  
8 Dr. Emmert, that there would be some punishment  
9 meted out to Penn State through some form and  
10 process?

11 MR. KOWALSKI: Objection to form. I  
12 want to make sure to limit it to  
13 conversation with Dr. Emmert that did not  
14 involve Donald Remy and did not involve  
15 legal advice, to your knowledge.

16 A. Yeah, I think I'm still there. And  
17 I took no view in that regard. And that is my  
18 training in enforcement.

19 This matter is going to be processed  
20 further in some fashion. I didn't make a value  
21 judgment on what that outcome might be. And so  
22 I was inserting myself in order to gain that  
23 kind of understanding and information, so that  
24 comes later.

25 Q. Okay. No outcome in terms of

1 punishment?

2 A. That wasn't my driver.

3 Q. And that wasn't something you  
4 understood as the necessary end result, at  
5 least initially when you had your conversation  
6 with Dr. Emmert? He did not say, for instance,  
7 the result is we're going to sanction Penn  
8 State?

9 A. I'm -- no, that wasn't my -- that  
10 wasn't my conversation.

11 Q. Okay. Now let's take a look at --  
12 what are we on there, Berst 13. This is an  
13 email that starts out as an email from Gene  
14 Marsh to Donald Remy, and then Donald Remy  
15 forwards it on to you.

16 By the way, notwithstanding your  
17 participation and presumptive superior  
18 understanding of the bylaws, was Donald Remy  
19 the chief spokesman for NCAA's -- the chief  
20 interlocutor with Gene Marsh in this matter?

21 MR. KOWALSKI: Objection to form.

22 Q. Who is the skipper here?

23 MR. KOWALSKI: During the calls with  
24 Marsh?

25 Q. In interacting with Marsh to resolve

1 the matter with Penn State, who was the  
2 decision-maker vis-à-vis you and Donald Remy?

3 A. Well, I'd say neither of us are the  
4 decision-maker. We would be the ones involved  
5 in communications with Gene. But often, that  
6 may be simply as a reporter or as a conveyor of  
7 information. So we certainly weren't the  
8 decision-makers.

9 Q. Was Mr. Remy either officially or  
10 non-officially designated as the primary point  
11 of contact with Gene Marsh at this time?

12 A. Well, Donald Remy would have been  
13 the general counsel of the NCAA. So to the  
14 extent you'd have attorneys representing the  
15 university, talking to attorneys representing  
16 the NCAA, that's the natural and appropriate, I  
17 think, mechanism for that to occur.

18 Q. The email, the July 17 email from  
19 Gene Marsh to Mr. Remy references a phone call  
20 from this morning. Do you have any knowledge  
21 on what that phone call was about?

22 A. Not without seeing what he's  
23 referring to, if it somehow looks like it's  
24 referring to some comments from Mark Emmert. I  
25 don't know what those are.

1 Q. You don't know what those comments  
2 are either?

3 A. No.

4 Q. Okay. Remy replies that: We did  
5 not intend for our discussion into our process  
6 to be public.

7 Was it your understanding that NCAA  
8 desired confidentiality with respect to its  
9 discussions with Gene Marsh and Penn State at  
10 this point?

11 MR. KOWALSKI: Yeah, just caution  
12 you not to reveal the contents of  
13 privileged communications with Mr. Remy.

14 A. Yeah, I think I probably can't  
15 answer that question.

16 MR. KOWALSKI: Okay. Then please  
17 don't. Thank you.

18 Q. All right. There is a forward --  
19 I'm going to ask something, but I know Brian is  
20 going to tell you not to answer it.

21 There is apparently -- there's a  
22 redaction at the top of this email, right? You  
23 see that, that big black box?

24 A. I didn't realize that's what it was,  
25 but I see that, yes.

1 Q. I'm going to represent to your  
2 counsel that while we don't know what that  
3 email says, the metadata for the email reveals  
4 it to be an email from Remy to you regarding  
5 Big 10. And that's in the re: line. Do you  
6 recall -- and I'm not asking about the  
7 substance of conversations, do you recall  
8 conversations with Donald Remy around this time  
9 that involved discussions about the Big 10?

10 MR. KOWALSKI: Yeah, we would have  
11 to step out again.

12 MR. SEIBERLING: Well, look. Since  
13 it's in the metadata and the re: line says  
14 Big 10, I think to ask him whether he  
15 recalls conversations without asking him  
16 what the substance is --

17 MR. KOWALSKI: Sure. If he can say  
18 yes or no, I remember conversations with  
19 Remy about the Big 10, I think we can go  
20 that far.

21 MR. HAVERSTICK: That's fine. I  
22 think if that was privileged anyway, it was  
23 probably waived because it was --

24 MR. KOWALSKI: If it was something  
25 that wasn't put on the privileged log, it

1           was obviously not privileged.

2           Q.       I'm asking at this point whether you  
3 recall either specifically in this email chain  
4 or generally conversations with Mr. Remy  
5 occasioned around the time of your discussions  
6 with Gene Marsh that involved Big 10? I'm not  
7 asking for the substance, just whether you  
8 recall?

9                   MR. KOWALSKI: He's just asking  
10 whether you remember that.

11          A.       Yes, I believe I remember that, yes.

12          Q.       Okay. Are you able to -- are you  
13 able to -- are you able to discuss the topic  
14 matter of those conversations without revealing  
15 any communication between you and Donald Remy  
16 that either was legal advice from Mr. Remy or  
17 was you providing information to solicit legal  
18 advice?

19                   MR. KOWALSKI: I think we just did  
20 say the topic, so I don't think we can go  
21 further than the topic which we just  
22 conveyed.

23                   MR. SEIBERLING: The subject matter,  
24 actually.

25                   MR. KOWALSKI: Whatever. The

1 subject matter is the Big 10. I think  
2 that's as far as you can go without getting  
3 into the contents and details of the  
4 privileged communication. You can ask him  
5 all about the discussions with Gene Marsh.  
6 I think that's pretty relevant.

7 Q. Yeah. Were you talking with Gene  
8 Marsh about issues related to the Big 10?

9 A. At some juncture, I would have, yes.

10 Q. And what were those conversations?

11 A. Merely that there was a process as  
12 well for consideration of Penn State by the Big  
13 10. So just to be aware that there was a  
14 process occurring among Big 10 presidents as  
15 well.

16 Q. That Big 10 -- and by process, you  
17 mean Big 10 was contemplating some action  
18 against Penn State on its own?

19 A. They had a process to consider  
20 information either made public or provided to  
21 the Big 10 by Penn State.

22 Q. Do you know whether as a result of  
23 your communications with Gene Marsh, Gene Marsh  
24 began negotiations with the Big 10 over any of  
25 those process issues that Big 10 was raising?

1 A. I do not.

2 Q. Do you know what Big 10 sought to  
3 accomplish with respect to its process  
4 regarding Penn State?

5 A. No.

6 Q. Do you know whether Big 10 at this  
7 point, contemplated some level of sanctions  
8 against Penn State?

9 A. I don't know at that juncture.

10 Q. Ultimately, they did?

11 A. Yeah, I'm aware of that.

12 Q. Okay.

13 A. But I think at this point, no, I  
14 didn't know that.

15 Q. Tab 27.

16 MR. KOWALSKI: Why don't we take a  
17 quick break for a few minutes. We're still  
18 on track?

19 MR. HAVERSTICK: Well, I mean if we  
20 can -- yeah.

21 MR. KOWALSKI: If we're on track,  
22 now would be a good last break.

23 MR. SEIBERLING: Here's what -- if  
24 we take a quick break, I reckon we'll go  
25 until 3:00. I think -- I think we can take

1 a quick break around 3:00. And there may  
2 be -- maybe there will be follow-up cleanup  
3 questions.

4 MR. KOWALSKI: Just to give you a  
5 chance.

6 MR. HAVERSTICK: I can burn through  
7 quickly.

8 MR. KOWALSKI: We'll take a quick  
9 break now. Space this out a little bit.  
10 Now is the right time.

11 (A short break was had.)

12 Q. All righty, Mr. Berst. While we  
13 were off the record, we were looking on an  
14 iPad -- because that's the age in which we  
15 live -- at a document I will read into the  
16 record is NCAA JC 00014366. And this is an  
17 email dated Sunday, July 15. Subject, call  
18 from Gene Marsh to Donald Remy. And it's a  
19 back and forth between Messrs. Remy and Marsh,  
20 and you are not on this email.

21 I showed it to you during the break,  
22 and I will read into the record that the first  
23 email from Gene Marsh reads: Hi, Donald.  
24 Thank you for the call Friday. Do you have  
25 time to talk briefly on Monday? I am still on

1 the trip. Get back late Tuesday but have time  
2 tomorrow. Let me know if you do and what time  
3 and your office phone. And then he talks about  
4 where he is in Maine.

5 If Sunday, July 15 was, in fact, 15,  
6 that would make the Friday call referenced,  
7 Friday, July 13. Does me reading this email or  
8 reading those dates to you refresh your  
9 recollection or otherwise inform you about when  
10 the first time you recall Gene Marsh  
11 materializing in these discussions?

12 A. Well, it helps me a little. And I'm  
13 still thinking I may not be involved yet with  
14 Marsh. I believe that I would have been on a  
15 call involving the executive committee earlier  
16 than that.

17 And that Donald begins to make  
18 those, get in touch with Gene. And I have a  
19 feeling the call where I try to insert -- or  
20 the call, the meeting where I insert myself  
21 hopefully is probably Monday or right about  
22 then. And then I begin to have conversations  
23 with Gene or get included in the conversations  
24 with Gene.

25 Q. Are the communications, once you

1 become included with Gene and with Remy,  
2 primarily by phone, primarily by email, or is  
3 there no primarily?

4 A. Primarily by phone; some by email.

5 Q. Are these three-person telephone  
6 calls? Is there anyone from NCAA participating  
7 other than you and Mr. Remy?

8 A. No.

9 Q. Do you recall if Gene Marsh had an  
10 associate or a colleague from his law firm  
11 participating on these calls?

12 A. Not in very good detail. I think  
13 there would have been a call or two where  
14 someone from the university would have  
15 participated, but that would have been  
16 infrequent, I think, in those calls.

17 Q. Why in these early telephone calls,  
18 if you know, was Julie Roe not a participant?

19 MR. KOWALSKI: And please don't  
20 reveal the contents of privileged  
21 communications with Donald Remy or other  
22 NCAA legal counsel.

23 A. I don't have any way of answering  
24 that. Julie Roe was not a consideration for me  
25 because I was trying to find some way into this

1 process in an effort to either find a way to  
2 avoid enforcement or if we had to go  
3 enforcement, then you can certainly involve  
4 Julie Roe. But it seemed to me to be premature  
5 to do that.

6 Q. No need for an enforcement person  
7 until you decide you're going to go the  
8 enforcement route, and that hadn't been decided  
9 yet?

10 MR. KOWALSKI: Objection to form.

11 A. From my perspective, that's right.

12 Q. When do you recall your  
13 conversations with Mr. Remy and Mr. Marsh --  
14 I'm not asking about your conversations with  
15 Mr. Remy alone. I'm only asking about the  
16 three of you. When do you recall the first  
17 time that conceptually what we now know as the  
18 consent decree was discussed? And you can call  
19 it whatever you want. I'm not wedded to the  
20 term. That's just the term I have for it.

21 A. I believe in my first call with Gene  
22 Marsh --

23 Q. Who --

24 A. -- I probably wouldn't have used the  
25 words consent decree, I don't think that

1 existed. But I would have talked through  
2 things like, well, all of the processes with  
3 him, including stipulating to matters that  
4 could be handled more quickly.

5 Q. Is the first time conceptually what  
6 became the consent decree was discussed among  
7 anyone, was when you discussed it as a  
8 possibility, regardless of what it was called?

9 MR. KOWALSKI: Don't reveal any  
10 privileged communications in answering,  
11 please.

12 A. I believe that to be the case. It  
13 may not have been the first conversation where  
14 that would occur. But the idea certainly  
15 surfaced in that, in a call with Gene. And he  
16 became very interested in whether there was  
17 some possible process that could be quicker  
18 than going through what I call -- I'm sure I  
19 used the word, I have everywhere else -- the  
20 hard slog of trying to go through infractions.

21 Q. Did the idea for the concept that  
22 became the consent decree originate with you?

23 A. I don't think -- I don't know the  
24 word consent decree.

25 Q. Me neither.

1           A.       So I don't believe that word was  
2 mine. I think looking for a way to move more  
3 quickly was certainly mine. And there may have  
4 been other people trying to figure out how you  
5 might get there from here. But I was saying  
6 that to anyone I was talking to.

7           Q.       So at least with respect to -- well,  
8 I'll ask internally and object, and we can  
9 figure out if you can answer.

10                   Internally inside NCAA, do you  
11 recall you being the first proponent of this  
12 worked out notion? I don't know what to call  
13 it. You know what we're talking about. The  
14 concept that ultimately ended up with the  
15 consent decree product, did that thought  
16 process, idea, emanate with you internally?

17           MR. KOWALSKI: So I'll object to the  
18 form of the question. And you can answer,  
19 you know, the yes-or-no question that he's  
20 posed to you.

21           A.       Yeah, I don't -- I don't know the  
22 answer to that for sure. I was advocating all  
23 possible approaches, that quicker and avoiding  
24 enforcement would be the best. Now, whether it  
25 was me or someone else who actually put the

1 pieces together, I'm not sure who did it first.

2 Q. Was it -- from the time of your  
3 involvement to the conclusion of the process  
4 with Gene Marsh, was your preferred mode to  
5 resolve the matter with Penn State by the use  
6 of a vehicle that became the consent decree?  
7 In other words, a cooperative, collaborative  
8 agreement or stipulation or, you know, what  
9 have you?

10 MR. KOWALSKI: Object to form.

11 Q. It's a lousy question. I'm just  
12 trying --

13 A. I question whether I was that smart  
14 at the very beginning in the first call. But  
15 soon I became intensely interested in trying to  
16 pursue that.

17 Q. Was your intense interest and  
18 concept for what the outcome ultimately became  
19 informed by the -- you're going to have to tell  
20 me the right term for it -- but informed by the  
21 use of the vehicle in the enforcement process,  
22 the stipulated process?

23 A. Yes, that was a process that I had  
24 been involved in developing, so I was familiar  
25 with it, yes.

1 Q. Conceptually at least in your mind  
2 when you were thinking through the resolution  
3 with Gene Marsh and discussing it, were you  
4 modeling it at least in part on that vehicle  
5 that you had used in the enforcement side,  
6 understanding this wasn't an enforcement  
7 action?

8 A. Not entirely. It was merely trying  
9 to establish some sort of a stipulated  
10 agreement, what is it that we all can agree to  
11 here, is there something. And if there is,  
12 maybe there's a way to move this more quickly.

13 Q. You indicated that Gene Marsh was  
14 receptive to this as a solution?

15 MR. KOWALSKI: Objection to form.

16 A. He was, he was listening, I think,  
17 to any of the possible options. Eventually, he  
18 became interested in that concept, but I don't  
19 know the timing of when he got onboard. And I  
20 just don't know the answer to that.

21 Q. Did he propose any other modes or  
22 solutions for this process, other than your  
23 concept of the stipulated agreement or whatever  
24 we call it? We know what we're talking about  
25 now, I think.

1           A.       We talked through all the other  
2 options and he said what ifs. We talked about  
3 stipulated agreements or the summary  
4 disposition, and talked about a normal  
5 infractions investigation, how that might go.  
6 Are there, you know, are there those that are  
7 motivated to go that way. The answer to that  
8 was yes. And are there other options. I think  
9 he was just trying to find other options  
10 himself, as was I.

11           Q.       Who was motivated to use the  
12 infractions process?

13           A.       Everybody that I talked to. I mean,  
14 anyone in the public thought the infractions  
15 process ought to be imposed, you know, probably  
16 even unilaterally on Penn State. But  
17 obviously, that couldn't happen.

18           Q.       Well, when you say in the public, do  
19 you mean friends and family? Or do you mean  
20 the public as in your colleagues and members,  
21 you know, athletic directors, presidents, that  
22 public?

23                   MR. KOWALSKI: So we're not talking  
24 about conversations with Remy just right  
25 now.

1           A.       Correct, we're not. We're talking  
2 about, yes, conversations I might have with  
3 institutional personnel or even listening to  
4 presidents talk. I don't think any of them  
5 were familiar with nuances of how you do  
6 various process or how you handle various  
7 processes. But their interest was pursuing is  
8 through enforcement.

9           Q.       Internally at NCAA, were there  
10 people using the traditional enforcement or  
11 infraction process?

12                   MR. KOWALSKI: I caution you not to  
13 reveal any privileged communication.

14           A.       I'm not sure that I've had those  
15 conversations, other than in the presence of  
16 Donald and other of those vice presidents, so I  
17 don't think I can answer that.

18           Q.       I'm going to ask it another way that  
19 I think you can. Your counsel will tell you.  
20 Did Dr. Emmert ever express to you a preference  
21 for the enforcement mechanism or the  
22 enforcement process versus another process?

23                   MR. KOWALSKI: In the context of  
24 meetings with Mr. Remy --

25           A.       I don't think he offered a

1 preference. I think --

2 MR. KOWALSKI: Let's be careful not  
3 to go into too much detail on this,  
4 Mr. Berst.

5 THE WITNESS: Okay.

6 MR. KOWALSKI: First, were the  
7 communications you're thinking about with  
8 President Emmert in the presence of legal  
9 counsel?

10 THE WITNESS: Yes.

11 MR. KOWALSKI: We have to be  
12 careful.

13 Q. Your answer was no, you don't recall  
14 him expressing a preference?

15 MR. KOWALSKI: Right. So we don't  
16 have to go there.

17 Q. You're going to be annoyed?

18 MR. KOWALSKI: Which one of us?

19 MR. HAVERSTICK: Everybody.

20 Everybody but me. Probably me too.

21 Q. Catalog for me the options you  
22 recall being discussed with Gene Marsh for ways  
23 to resolve the situation?

24 A. I think I've already talked about  
25 all of them. The, what I call the hard slog of

1 simply sending out NCAA investigators without  
2 any prior information even to begin to inquire  
3 into matters related to Penn State. Evaluating  
4 not just what's known through the public media  
5 but the rest of the athletics program as well.

6 Q. Would that be through the auspices  
7 of the traditional infractions process?

8 A. Yes.

9 Q. Okay. That's one.

10 A. Would be simply taking the Freeh  
11 Report and using that as a starter in launching  
12 an NCAA inquiry into the athletics practices of  
13 the university, not limited to those matters  
14 that were included in the Freeh Report.

15 Q. Also an infractions auspices?

16 A. Yes.

17 Q. Okay.

18 A. The so-called stipulated agreement  
19 of facts. And then the possibility if those  
20 point out NCAA rule violations like  
21 institutional control, taking that as a summary  
22 disposition kind of a case through the normal  
23 infractions process.

24 Q. On that point, I neglected to ask  
25 this earlier. As a matter of process, if there

1 was a stipulated factual determination like  
2 that, does the committee on infractions then  
3 impose punishment as a separate proceeding or  
4 do you also stipulate to the punishment?

5 A. You don't stipulate to the  
6 punishment. It is as a result of the hearing  
7 with the committee on infractions to review the  
8 stipulated findings and the penalties assessed.

9 Q. So that's three. Those all involve  
10 a traditional infractions process. Other than  
11 doing nothing, is the fourth the process that  
12 is outside the infractions process which  
13 results in the executive committee doing  
14 something, approving something?

15 MR. KOWALSKI: Objection to form.

16 A. Well, the fourth would be the  
17 executive committee assuming jurisdiction in  
18 the matter because they consider it to be so  
19 heinous an offense and a matter that demands  
20 being addressed by the overall association.  
21 And I'm sure we covered all of those, including  
22 by the time I talked to him, the fact that we  
23 had at least one call of the executive  
24 committee members wherein they, individually as  
25 I described earlier, had almost to a person

1 indicated that they believed penalties such as  
2 the so-called death penalty appeared to be  
3 appropriate in this kind of a matter. So I was  
4 trying to explain to him that from my  
5 perspective, this was a grave situation.

6 Q. Options 1, 2, 3 would all be what  
7 you've characterized as hard slogs, long slogs.  
8 Those are processes that occur over a period of  
9 time, correct?

10 A. Yes.

11 Q. Process 4 is one that could be, on  
12 the other hand, wrapped up potentially quite  
13 quickly?

14 A. Well, I'm not sure in the first  
15 conversation we would have that I would know  
16 how to do that at that juncture. I believe  
17 that the executive committee had interest in  
18 assuming jurisdiction, but I don't know that I  
19 knew the -- I don't think I knew of the consent  
20 decree at that point.

21 Q. Was it ever communicated to Gene  
22 Marsh that there was a desire by NCAA to  
23 resolve this matter quickly?

24 A. Well, I don't know how it would have  
25 been phrased. I certainly would have been

1 involved in conversations with him, with Gene  
2 Marsh about the -- eventually when there was a  
3 set, there was an actual report from Freeh that  
4 the institution accepted, would follow through  
5 with in implementing recommendations and would  
6 assume responsibility for, I saw that as a  
7 matter that could be used by the executive  
8 committee to assess appropriate penalties.

9 Q. When did the appropriate penalties  
10 begin to materialize? In other words --

11 A. There was a second call of the  
12 executive committee in which much of the same  
13 kind of thinking, attitude of individual  
14 presidents I think was expressed. But there  
15 was an agreement by the presidents to permit  
16 the president of the association to evaluate  
17 what he believed might be the most palatable,  
18 most appropriate set of penalties that could be  
19 attached to the so-called consent decree. And,  
20 you know, that may or may not then include the  
21 so-called death penalty. I think there were  
22 some still saying do that, but there at least  
23 was authorization for him to consider further  
24 what to do.

25 Q. Did you believe that Gene Marsh on

1 behalf of Penn State had the right to reject a  
2 proposal that involved executive committee  
3 consideration and instead opt for the  
4 infractions process?

5 A. At every step. And I believe -- I  
6 don't know that he could do that  
7 unilaterally -- his obligation I would expect  
8 would be to go back to Erickson or whoever else  
9 he was reporting to at the institution and any  
10 or all of them could take that step at any  
11 juncture.

12 Q. And had that step been taken,  
13 assuming appropriate authority from president  
14 Erickson, would NCAA to your knowledge have  
15 honored that request and instead used the  
16 traditional infractions process?

17 MR. KOWALSKI: Objection to form.

18 Go ahead.

19 A. I believe that it would have, yes.

20 Q. Was that a topic of discussion  
21 internally?

22 MR. KOWALSKI: You can answer yes or

23 no.

24 Q. Yeah.

25 A. I don't believe so.

1 Q. You're premising your answer on your  
2 understanding of the situation, or was it based  
3 more on your understanding of what the bylaws  
4 are?

5 MR. KOWALSKI: You can go ahead and  
6 answer, don't reveal --

7 A. Take me back to what your real  
8 question is.

9 Q. How did you come to understand --  
10 no, no, no, that's the wrong question. What's  
11 the source of your knowledge or information  
12 that you believed that had Marsh rejected  
13 executive committee scrutiny and instead opted  
14 for the enforcement process, that NCAA would  
15 have agreed, all right, we'll do the  
16 enforcement process?

17 MR. KOWALSKI: Just caution you not  
18 to reveal the contents of privileged  
19 communications with legal counsel.

20 A. I probably come to that conclusion  
21 on my own just based on how I think the  
22 processes would work.

23 Q. And what processes are those?

24 A. The enforcement process and the  
25 executive committee jurisdiction.

1 Q. Is there a mechanism by which a  
2 member may compel adjudication by the  
3 enforcement process as opposed to some other  
4 process?

5 MR. KOWALSKI: Objection to form.

6 A. I'm not sure that I follow you. Any  
7 time there's a potential violation of NCAA  
8 rules, the enforcement process is the natural  
9 one to come into play.

10 Q. But that's not here yet when you're  
11 talking to Gene Marsh what was happening,  
12 right?

13 MR. KOWALSKI: Objection to form.

14 A. I can't answer that for sure. From  
15 my perspective, I was trying to keep it away  
16 from the -- whether you had a violation or not  
17 made no difference to me. The university may  
18 well have acknowledged violations either in the  
19 Freeh Report or separately in the consent  
20 decree. That wasn't important in my view. If  
21 there was a set of facts for which they took  
22 responsibility, that was enough for the  
23 executive committee to act. And the  
24 institution could demand that the matter be  
25 handled by the enforcement process.

1 Q. So that was an option that was open  
2 to Penn State at that time?

3 A. Yes.

4 Q. Rather than the option that became  
5 the consent decree, your testimony is the  
6 university could have chosen to be adjudicated  
7 through the enforcement process?

8 A. At any point in the process, not  
9 just then.

10 Q. Was it ever communicated to the  
11 university, either by you or by anyone else, to  
12 your knowledge, that if Penn State chose to  
13 invoke the enforcement process, that it was at  
14 serious risk of receiving the death penalty?

15 A. In my conversations with Gene, I  
16 indicated that there certainly would be  
17 interest in pursuing the matter and that it is  
18 possible that the death penalty would be  
19 imposed. That was how I was reading the mood  
20 of the membership and the public basically.

21 Q. I want to be careful because I don't  
22 want to inquire about your conversations with  
23 Mr. Remy if they get into legal advice.

24 A. That's my conversation with Gene.

25 Q. Gene Marsh. Did you -- was -- did

1 the words you used to express that sentiment  
2 express a sentiment that Gene, you are likely  
3 to get the death penalty if you go the  
4 infractions route or, Gene, it's on the table  
5 if you go the infractions route?

6 A. It was probably closer to the  
7 latter, that the so-called death penalty comes  
8 into play. And there would be those that would  
9 advocate for it.

10 Q. Now, at the time you're having these  
11 conversations with Mr. Marsh, has the  
12 possibility of the alternative process  
13 involving the executive committee matured to  
14 the point that it's coalesced into a real  
15 thing, a description of a process that could be  
16 used?

17 MR. KOWALSKI: Objection to form.

18 Q. Did he have alternatives at that  
19 point, in other words?

20 A. I think he always had alternatives,  
21 and the consent decree alternative may have  
22 been slower in developing than the others but  
23 couldn't -- it must have hours or a day or  
24 something.

25 Q. Do you recall a conversation with

1 Gene Marsh in which the substance of the  
2 communication was Penn State can accept the  
3 punishments it will get through the executive  
4 committee and, you know, a stipulated result, a  
5 consent decree, whatever by that point it was  
6 being called, or it can go the infractions  
7 route and it runs serious risk of the death  
8 penalty?

9 A. I don't think it was ever phrased  
10 that way. I think it was -- and I think it was  
11 understood by Gene that we might not ever get  
12 to the point where we could prove a case that  
13 would finally result in the death penalty. I  
14 believe there were people interested in heading  
15 in that direction.

16 But I would guess he didn't consider  
17 that a realistic threat. I think he knew all  
18 the problems we would have in developing the  
19 case.

20 Q. You don't believe that Gene Marsh  
21 thought that the imposition of the death  
22 penalty was a realistic threat, if he proceeded  
23 with --

24 A. That isn't what I said.

25 Q. That's why I'm trying to be clear.

1           A.       That if you went the enforcement  
2 investigation route, that there were -- I think  
3 he was as well aware as I was of the various  
4 impediments in making it to the end of that  
5 process, that at which time, the death penalty  
6 could be considered. I think he knew that it  
7 was relatively unlikely we could prove the case  
8 adequately to get there.

9           Q.       Was that ever said aloud or that is  
10 your understanding of what you believe Gene  
11 knew? Did you two discuss that openly?

12          A.       Yes, and I think he even said that.

13          Q.       Something like you're going to have  
14 problems proving your case?

15          A.       Yes.

16          Q.       Was the option of the executive  
17 committee's process that became the consent  
18 decree ever presented to Gene Marsh as one that  
19 would not include the death penalty?

20          A.       Well, at the very end when the  
21 actual consent decree was a part of the final  
22 package, the penalties included, I don't  
23 believe included no play in the sport. I'm not  
24 certain of that. You can correct me if that's  
25 wrong. I was thinking it was a several-year

1 period of being out of post-season play rather  
2 than you can't compete.

3 Q. Who within NCAA determined the  
4 precise punishments that would be implemented  
5 as part of what became known as the consent  
6 decree -- became known as the consent decree?

7 MR. KOWALSKI: One second, please.  
8 Let's just find out how he knows and then  
9 answer the question.

10 A. Yeah, I don't think I can get -- I  
11 don't know if I can answer that, because I  
12 don't recall any conversations that wouldn't  
13 have involved Donald at that point.

14 Q. We'll take two minutes and if you  
15 can't answer the question, you can't answer the  
16 question.

17 (A short break was had.)

18 MR. KOWALSKI: So can we have the  
19 question read again so he can answer it.

20 BY MR. HAVERSTICK:

21 Q. Yeah, please have her read it back.

22 (Record read as requested.)

23 A. I think I can answer that. And I  
24 said this earlier, in the second call of the  
25 executive committee, they authorized Mark

1 Emmert to explore what he would consider to be  
2 the appropriate set of penalties that might  
3 attach to a so-called agreement with Penn  
4 State.

5 Q. Mark Emmert developed the specific  
6 penalties that became attached to the consent  
7 decree?

8 A. Yes.

9 Q. Were those communicated to you and  
10 Mr. Remy as deal points to be communicated to  
11 Gene Marsh?

12 MR. KOWALSKI: Hold on one second.  
13 Sorry. That is a communication with legal  
14 counsel for privileged purposes, so you  
15 can't answer that question.

16 Q. Did you modify any of the penalties  
17 decided upon by Dr. Emmert prior to  
18 communicating them to Gene Marsh?

19 MR. KOWALSKI: Be careful not to  
20 reveal any privileged communications. He's  
21 asking a yes-or-no question, so I think you  
22 can answer that.

23 A. The answer is no.

24 Q. Did, to your knowledge, the  
25 executive committee delegate or deputize -- I

1 don't mean those words precisely -- the  
2 authority to determine an appropriate  
3 punishment attached to the consent decree to  
4 Dr. Emmert?

5 A. He was authorized to explore  
6 essentially a recommended penalty to the  
7 executive committee. They would have the final  
8 authority to adopt it or not adopt it.

9 Q. And that authority would be  
10 exercised at some point where presumably  
11 Dr. Emmert would report back, we have agreement  
12 with Penn State on the following terms,  
13 approve, not approve, executive committee?

14 A. The -- well, I wouldn't phrase it  
15 quite the same way. Because from the Penn  
16 State side of things, once they agreed to the  
17 Freeh Report and to accept responsibility for  
18 it, the so-called consent decree was developed.  
19 And once that was accepted, they were informed  
20 of penalties. But there, I believe already was  
21 the understanding that whatever it was the NCAA  
22 was going to ultimately do, they understood.

23 Q. As I understand your answer from  
24 perhaps an hour ago about negotiation, Gene  
25 Marsh was not at liberty to negotiate the

1 precise terms of the penalty?

2 A. I don't know what Penn State said he  
3 could do.

4 Q. But with respect to the NCAA's side,  
5 NCAA was not -- you weren't empowered to  
6 entertain, "I don't want to pay 60 million, I  
7 want to pay 30 million," as an example?

8 A. I was just involved in reporting  
9 information. And, I mean, the reference you  
10 make is interesting because that comes as a  
11 result of one of the first calls when the  
12 comments were made by individual presidents  
13 about, you know, this may -- this may be the  
14 kind of thing that deserves, you know, severe  
15 penalties. And actually, I had earlier used a  
16 financial penalty and I said \$30 million. And  
17 in that conversation, the executive committee  
18 used the word \$60 million. So I was merely  
19 reporting the significant nature of a financial  
20 penalty that was probably going to be involved  
21 in whatever might occur.

22 And so there was no negotiation.  
23 But what happened was I said one thing that  
24 changed from what I was understanding myself to  
25 a different figure from the board of directors'

1 perspective. And you somewhere have, I'm sure,  
2 an email that says that kind of made him mad.  
3 And I don't blame him, but that didn't change  
4 anything.

5 Q. Now, on that point, did the  
6 executive committee authorize your negotiating  
7 team to first implement a term of \$30 million,  
8 or did you come up with the \$30 million figure?

9 A. Well, I first object to referring to  
10 us as a negotiating team. And I talked to you  
11 earlier about the word negotiation.

12 Q. Team NCAA.

13 A. What occurred was that the  
14 \$30 million figure was intended to be  
15 illustrative of the potential seriousness of  
16 the case from the perspective of the board.  
17 And while Mark was provided authority to come  
18 back with an additional recommendation to the  
19 executive committee, I took the 30 million from  
20 the conversation that was taking place on the  
21 phone and had no concept that that might  
22 change. And it changed, but it had nothing to  
23 do with any correspondence with Penn State or  
24 Gene Marsh. It was, you know, just me  
25 reporting wrong information.

1 Q. And so -- okay. I think that  
2 answers my question.

3 It was -- the 30 million figure was  
4 a miscommunication to Gene Marsh or  
5 misunderstanding by you of the penalty that the  
6 executive committee wanted to impose, rather  
7 than executive committee or Dr. Emmert saying  
8 propose 30 million and then deciding, you know  
9 what, propose \$60 million?

10 MR. KOWALSKI: Object to form. Go  
11 ahead.

12 A. No. My interest was in trying to at  
13 least advise the institution and Gene that  
14 there was going to be a significant financial  
15 penalty involved, and that was my only  
16 intention. And then I realized that that was  
17 not going to -- going to be considered  
18 adequate, so it was going to be something like  
19 60.

20 Q. You came up with the figure that you  
21 thought as you said was illustrative of the  
22 idea that NCAA had in mind and you communicated  
23 that to Gene to give him an idea what you were  
24 talking about, and then learned that actually  
25 NCAA was considering a higher sum; fair?

1 A. I think that's about right, yes.

2 Q. I'll show you the email in a minute,  
3 because I'm going to try to run through those  
4 quickly. On the issue of the revocation of the  
5 wins, is it the case that when there was a  
6 final discussion of penalties, it simply was an  
7 omission by NCAA's side to mention that to Gene  
8 Marsh?

9 A. It was indeed. The information was  
10 provided by telephone, and that was just in a  
11 different column. And I recognized that there  
12 was a failure to report that information, which  
13 I think was immediately corrected.

14 Q. Is -- were the -- I don't want to  
15 call them deal terms because I don't want you  
16 to get mad at me. Were the terms that  
17 Dr. Emmert developed as the punishment terms  
18 ever given to you in any kind of written  
19 document? Is there a sheet, a spreadsheet  
20 saying, for instance, here's what they are?

21 MR. KOWALSKI: Objection to form.

22 A. No, I never had any such thing. And  
23 I don't know how to respond beyond that,  
24 because that would involve Donald Remy.

25

1                   (Berst Exhibit Number 14 marked for  
2                   identification.)

3           Q.       All right. Let's take a look  
4           quickly at Tab 27, which is Berst 14. I've  
5           been imprecise in trying to nail down dates  
6           where the settlement discussions, for lack of a  
7           better term, are developing. If as we go  
8           through these emails, it helps you to  
9           articulate that yes, I remember on this date,  
10          the conversation had developed here, please let  
11          me know.

12                   This is an email, at least the  
13           non-redacted part is an email from Gene to you,  
14           re: Question. Do you recall reading this  
15           email what the question was?

16          A.       No, I don't.

17          Q.       Do you recall Gene Marsh calling you  
18           on July 17, either on your cell or your direct  
19           line?

20          A.       I don't recall specifically. He  
21           would have called me, you know, half a dozen  
22           times probably.

23          Q.       Would he have called you primarily  
24           to discuss issues like an intellectual debate  
25           over the applicability of the death penalty?

1 MR. KOWALSKI: Objection to form.

2 A. He -- I don't recall him calling for  
3 that reason. He would call related to, you  
4 know, a process kind of a question that I  
5 probably know more quickly than anyone else.

6 Q. As an aside, when -- well, you  
7 testified that there was discussion about the  
8 perceived difficulty of proving a case on the  
9 enforcement side. And that was at least Gene  
10 Marsh's suggestion to you, that there would be  
11 problems with that case, right?

12 A. He recognized the same impediments  
13 that I did.

14 Q. Did he in -- well, did he raise as  
15 an impediment his belief that only repeat  
16 offenders could receive the death penalty?

17 A. He did ask that question, whether a  
18 so-called death penalty could be imposed in the  
19 first instance rather than only in a repeat  
20 violator case.

21 Q. And what did you tell him?

22 A. I told him it could, in fact, be  
23 applied. That there was no limitation,  
24 frankly, on the committee on infractions in  
25 imposing any set of penalties that it wished

1 to.

2 Q. Do you know if that view of the  
3 applicability of the death penalty is accepted  
4 throughout the enforcement division?

5 A. I would say that -- I don't know  
6 precisely whether that's -- whether that's the  
7 practice in all instances. It's -- it was a  
8 set of bylaws that I actually wrote so I know  
9 the room was left to do that.

10 Q. Are you aware of the death penalty  
11 being imposed on a member that was not a repeat  
12 offender?

13 A. Well, yes. McMurray college in the  
14 sport of tennis. Actually, there's been a  
15 couple of self-imposed similar cases involving  
16 Tulane University and University of San  
17 Francisco. Other than that, it would be a  
18 repeat violator case involving SMU.

19 Q. What were the facts in the McMurray  
20 tennis team case?

21 A. It was an out of control booster of  
22 a program. I say out of control. There might  
23 be some objection from somebody else when I say  
24 that.

25 Q. Not from me.

1           A.       But it was a relative of the tennis  
2 coach and it related to benefits provided to  
3 international student athletes that were part  
4 of their team for a period of years.

5           Q.       Did Gene Marsh challenge you on your  
6 position that repeat offenders -- I'm sorry,  
7 that non-repeat offenders could receive the  
8 death penalty?

9           A.       I think he questioned me closely at  
10 least on that point.

11          Q.       Turning your attention to, let's  
12 take Tab 28.

13                    While we do that, do you know if  
14 Gene Marsh ever informed Penn State that Penn  
15 State had the ability to compel invocation of  
16 the infractions process?

17          A.       I don't have any knowledge of  
18 communications between him and the university.

19          Q.       I understand.

20                    (Berst Exhibit Number 15 marked for  
21 identification.)

22          Q.       This is now Berst 15 that we're  
23 looking at. I draw your attention to the  
24 bottom email, which is from Gene to you noting  
25 that he just got off the phone with president

1 Erickson, PSU lawyers, et cetera. I gave them  
2 a full briefing, a lot of which he had heard in  
3 his discussion with Mark Emmert last week?

4 Do you know what Gene Marsh meant by  
5 a full briefing as of July 18?

6 MR. KOWALSKI: Objection.

7 A. Not precisely, no.

8 Q. By July 18, if you know, had your  
9 conversation with Gene Marsh matured to the  
10 point that the concept of a consent decree was  
11 discussed?

12 A. When was the date of the final  
13 action in this matter, do we know?

14 MR. KOWALSKI: July 23rd.

15 Q. 23rd.

16 A. I would think that this, by this  
17 time, we were in those conversations.

18 Q. Do you know what Mark Emmert was  
19 communicating to President Erickson in his  
20 telephone calls?

21 A. I do not.

22 MR. HAVERSTICK: Let's look at  
23 Tab 30. Why don't we mark Tab 31 first.  
24 You can mark that one and 30.

25

1                   (Berst Exhibit Number 16 marked for  
2                   identification.)

3           Q.       I'm going to hand you Berst 16.  
4           It's another email chain between you and  
5           Messrs. Remy and Marsh. Take a look.

6           A.       Okay.

7           Q.       I want to start with the second  
8           page. And there is a note: Donald and David,  
9           my conference call today with President  
10          Erickson and other folks involved was very  
11          positive and encouraging. I think we will very  
12          quickly get to a point where PSU agrees with  
13          the ideas that have been put forward.

14                   As of July 18, if you know, are the  
15          ideas that have been put forward to which Marsh  
16          references, the ideas that conceptually are the  
17          consent decree?

18          A.       I believe it's finding the mechanism  
19          to move this along. I'm still not sure I knew  
20          the words consent decree, but some sort of  
21          stipulated specific set of facts.

22          Q.       Are specific punishments part of the  
23          ideas put forward as of this date, if you know  
24          or remember?

25          A.       We talked earlier about reporting

1 the thinking of Mark Emmert. I don't know, I  
2 don't know when that is. I don't know if it's  
3 this day, next day, or the following day. But  
4 it's certainly involved in this set of  
5 conversations.

6 Q. The final clause of that sentence  
7 refers to Mark Emmert being able to make a  
8 presentation to the NCAA board that can be  
9 defended. What needed to be defended in a  
10 presentation Mark Emmert would make to the NCAA  
11 board, if you know?

12 A. Well, he would still have the burden  
13 to report adequately what his thinking is on  
14 what the appropriate actions might be in regard  
15 to Penn State for agreement by the executive  
16 committee.

17 Q. Is it the intention, as far as you  
18 understood as of July 18, that Mark Emmert  
19 would decide on a resolution he believed to be  
20 appropriate and present it to the board for  
21 board up or down approval?

22 A. Well, your question that you just  
23 posed would be correct at some juncture. I've  
24 had trouble the whole time picking which day  
25 these things happened. But if it was by the

1 23rd, then he was beginning to march down the  
2 road of figuring out what he wanted to present  
3 to the executive committee.

4 Q. But regardless of the date, the  
5 process Marsh is referring to is one where  
6 there's been a decision among Emmert, you, Remy  
7 and Marsh as to what the resolution is, and  
8 Emmert would take that to the NCAA board and  
9 present it as this is the solution we would  
10 like to use?

11 A. I don't know that for sure. I think  
12 what would have happened is that, recognizing  
13 that there was interest in heading this  
14 direction, there would be work done on whatever  
15 the consent decree would say. And that Mark  
16 Emmert would be working on he believed the  
17 appropriate set of penalties were to be. All  
18 of that information would be reported to Penn  
19 State for them finally to sign off on. But I  
20 think you characterized it as a little more  
21 give and take than that, and there really  
22 wasn't much of that.

23 Q. When Mark Emmert ultimately  
24 presented to the executive committee board a  
25 few days later, did he present two options for

1 the board's consideration or one, if you  
2 recall?

3 A. I don't recall.

4 Q. Have you ever heard anyone reference  
5 an Option A and an Option B as presented to the  
6 executive committee board?

7 A. I don't remember that.

8 (Berst Exhibit Number 17 marked for  
9 identification.)

10 Q. I'm going to show you Berst 17. It  
11 is a meeting invite, telephonic meeting invite  
12 between you, Donald, and Gene Marsh. I have a  
13 pretty good guess generally what you three were  
14 talking about on the 19th. Do you recall  
15 specifically what was discussed on July 19 in  
16 this call?

17 A. No.

18 Q. Let's have 32. We'll mark this  
19 exhibit as Berst 18.

20 (Berst Exhibit Number 18 marked for  
21 identification.)

22 Q. Take a look.

23 A. Okay.

24 Q. Start at the very last one. And I  
25 want to ask a timing question. First in the

1 chain temporally, last in the paper is an email  
2 from Remy to Gene copying you, subject: One  
3 more thing. And this appears to be the  
4 correction for the omitted wins penalty; am I  
5 right about that?

6 A. Tell me where you're looking.

7 Q. The very last page?

8 MR. KOWALSKI: Actually  
9 second-to-last page.

10 MR. SEIBERLING: Is it  
11 second-to-last? You're right. There's  
12 little junk at the back.

13 MR. KOWALSKI: That's what he's  
14 referring to.

15 A. Yes, that's correct.

16 Q. Is that how Gene Marsh came to learn  
17 that vacation of the wins was going to be a  
18 part of the penalty imposed on Penn State?

19 A. He received by email, a correction  
20 to the telephone call that had just taken  
21 place.

22 Q. Okay. Good. That's where I -- the  
23 other piece I wanted out of this. Seeing this  
24 email, do you recall that this email followed  
25 the telephone call that I showed you in the

1 prior exhibit?

2 A. Which makes sense. I think that's  
3 right, yes.

4 Q. And would it have been in that  
5 telephone call that you and Donald Remy would  
6 have laid out for Gene what the terms of the  
7 punishment would be under the concept that we  
8 now call the consent decree?

9 A. Yes.

10 Q. Would that have been the -- other  
11 than this one more thing email, was that to  
12 your knowledge, the final expression of the  
13 punishments that would be imposed as part of  
14 the consent decree?

15 MR. KOWALSKI: Objection to form.  
16 So in other words, did it change after  
17 that?

18 MR. HAVERSTICK: Yes.

19 A. And I believe that's right.

20 Q. Let's skip up from the Donald Remy  
21 email to Marsh apologizing, but adding the  
22 vacation and wins from 1994. Were -- well, do  
23 you recall a conversation with Gene Marsh in  
24 which the rationale for vacating wins back to  
25 1998 was explained or discussed with him?

1 A. I don't recall that, no.

2 Q. I don't -- I don't see it in this  
3 email. If I'm missing it, let me know as we go  
4 through it. Donald Remy then receives an email  
5 from Gene Marsh and you're copied on it. It  
6 starts with: These are just my own views, just  
7 mine and they are staying inside my head.

8 I think I know the answer to this,  
9 but I want to make sure I'm right. Gene Marsh  
10 references that he and his family paid a dear  
11 price for carrying the NCAA banner. What's  
12 that a reference to?

13 A. To an infractions case at the  
14 University of Alabama, where he was at that  
15 time, a faculty representative.

16 Q. Do you know what he means when he  
17 says he paid a personal and professional price  
18 and so did his family?

19 A. Well, I don't know precisely.

20 Q. Do you have an understanding?

21 MR. KOWALSKI: Yeah, I mean --

22 Q. If you know.

23 MR. KOWALSKI: And if it's really,  
24 really personal, we can talk that, too.

25 It's not necessary to do it on the record.

1           A.       He came under some pressure and  
2 scrutiny from fans of University of Alabama for  
3 being a person who was involved in infractions  
4 matters that -- or at least in reporting and  
5 helping to report infractions matters that  
6 could impact the University of Alabama.

7           Q.       And he was at that time, a faculty  
8 member at the University of Alabama?

9           A.       Yes.

10          Q.       I don't need more than that.

11                    He closes this email by noting that  
12 this is just his own personal rant. And then:  
13 At some point, an institution may be better off  
14 under a traditional infractions process, but  
15 that is just inside my head and going nowhere  
16 else for now.

17                    Two questions, Mr. Berst: First, do  
18 you know if Mr. Marsh, in fact, kept these  
19 thoughts to himself and -- I'm asking if you  
20 know -- and did not share them with anyone at  
21 Penn State?

22                    MR. KOWALSKI: Objection.

23           A.       I don't believe he, that he kept  
24 them to himself in regard to processes  
25 available to Penn State. I don't know whether

1 he shared with Penn State that to the extent  
2 the NCAA is going to attempt to evaluate the  
3 culture of, you know, an intercollegiate  
4 athletics program and its impact on the local  
5 community, whether that is something the NCAA  
6 should or should not do, then or in the future.  
7 I don't know. I don't know what he did with  
8 that information.

9 Q. Did I gather correctly that you  
10 believe that he may have informed Penn State  
11 that Penn State might be better off under the  
12 traditional infractions process? Or did I hear  
13 that wrong?

14 A. You heard that wrong.

15 Q. Okay.

16 A. I think I know Gene well enough to  
17 know he would review all of the options and if  
18 asked, he would provide more commentary on  
19 their impacts and the positives and negatives.  
20 But I think he'd do it in that spirit.

21 Q. But as we sit here now, you don't  
22 know what he told Penn State specifically on  
23 those points?

24 A. I'm basing my view just on the  
25 continuing conversations we had. I don't think

1 there were any secrets between him and the  
2 university regarding processes that might be  
3 available to them. I take it that's why he was  
4 hired.

5 Q. Did you -- I think I know the answer  
6 to that.

7 When do you recall Gene Marsh  
8 informing you that Penn State would agree to  
9 accept the consent decree with the punishment  
10 terms imposed by NCAA?

11 A. It had to be possibly even the day  
12 before this because it looks like on the 19th,  
13 there was work being done on what a consent  
14 decree will provide for. And he's offering  
15 some information that he hopes might be  
16 included somehow in that language. I don't  
17 know whether -- whether the penalties, I guess  
18 we figured out when those were reported, which  
19 may have been on the same day. And now I've  
20 lost the original question.

21 The sequence of events was that the  
22 consent decree was being drafted, I believe,  
23 and the penalties were being reported to him.

24 Q. Were you aware of whether President  
25 Emmert had scheduled a press conference to

1 announce sanctions against Penn State prior to  
2 the time that the consent decree was agreed to  
3 by Gene Marsh?

4 A. I don't know the timing of when  
5 things were scheduled. I would guess -- it  
6 doesn't sound impossible since everyone's going  
7 to be trying to think ahead on whatever the  
8 timing of these things are going to be in  
9 regard to how you present the information  
10 publicly.

11 Q. What was NCAA's plan if Gene Marsh  
12 rejected the consent decree, if you know?

13 MR. KOWALSKI: And if you can answer  
14 this without revealing privileged  
15 communications with legal counsel.

16 A. I really just have to speculate from  
17 what I know. That certainly could be a  
18 response by the -- by Penn State. And if so,  
19 everything would have been canceled and we  
20 would have gone on to the next step.

21 Q. Which would have been what?

22 A. Consider how to handle the matter  
23 further, whether it then rolls into a process  
24 that is a part of the infractions process or  
25 whether anyone could believe that there might

1 be a different process that could be applied  
2 through the executive committee under those  
3 circumstances.

4 Q. In your opinion -- I'm sorry, not  
5 your opinion.

6 Did you believe based on your  
7 knowledge of NCAA processes, that had Gene  
8 Marsh rejected the consent decree, that NCAA  
9 could have through the executive committee,  
10 acted on its own and imposed penalties, without  
11 any further discussion with Penn State?

12 MR. KOWALSKI: Objection to form.

13 A. Well, I mean, you really are causing  
14 me to speculate there, because we didn't get to  
15 that point because that isn't what occurred.  
16 But I would have argued against attempting to  
17 process it in that manner and would have  
18 suggested then going back through the  
19 enforcement process.

20 If you're asking me whether I can  
21 conjure up jurisdiction to do it, I think I  
22 can, yes.

23 MR. KOWALSKI: To do ...

24 A. For the executive committee to  
25 continue to consider it.

1 Q. Was it ever a discussion point  
2 internally that if the consent decree was  
3 rejected, an option was for the executive  
4 committee to impose punishment without further  
5 discussion and without use of the infractions  
6 process?

7 MR. KOWALSKI: Just be careful not  
8 to reveal the contents of privileged  
9 communications with legal counsel.

10 A. I'm not aware of that.

11 Q. To your knowledge, no one ever said  
12 to you, we have this as an option if they --

13 A. No one said that to me, no.

14 Q. And I think I asked this already and  
15 I think you answered it, I want to make sure  
16 I'm right now that we're going through it. Had  
17 Mr. Marsh rejected the consent decree in its  
18 final form and instead said Penn State opts for  
19 the infractions process, you believe the  
20 infractions process would have been utilized?

21 A. I do think that, yes.

22 Q. Was there ever any discussion  
23 internally that NCAA would refuse to utilize  
24 the requested infractions process and instead  
25 move to unilateral executive committee action?

1           MR. KOWALSKI: Same caution about  
2 not revealing privileged communications  
3 with legal counsel.

4           A. I'm not aware of that, no.

5           Q. Let's look at, because I am going  
6 to -- shoot, I'm behind my time.

7           MR. KOWALSKI: Shocker.

8           MS. DOBLICK: Why don't we take 5,  
9 Matt, before you move on to a different  
10 topic.

11           MR. KOWALSKI: How close are you?

12           MR. HAVERSTICK: We'll take 5 and  
13 I'll be able to tell you.

14                           (A short break was had.)

15           MR. HAVERSTICK: Back on the record.

16                           (Berst Exhibit Number 19 marked for  
17 identification.)

18                           (Berst Exhibit Number 20 marked for  
19 identification.)

20           Q. While you were out, I premarked  
21 several exhibits. I'm going to show you  
22 Exhibit 19 -- actually, why don't we show 19  
23 and 20 at the same time. We'll compare them.  
24 I just handed you two exhibits, Mr. Berst. And  
25 they are -- purport to be draft executive

1 committee notes of a meeting on July 21, 2012.

2 Okay?

3 A. Yes, I see them.

4 Q. Let's take a look at the first one  
5 first. This is a draft executive committee  
6 report. Is this the type of document that one  
7 would see memorializing decisions made in the  
8 executive committee? And I believe you  
9 described a document like this earlier. I want  
10 to make sure I'm --

11 A. Yes, it is.

12 Q. Okay. Now, this appears to be  
13 the -- this appears to be minutes of the  
14 executive committee of July 21, 2012, at which  
15 time action regarding Pennsylvania State  
16 University was approved. And I wouldn't read  
17 it all in. But it, in sum, authorizes  
18 President Emmert to enter into a consent decree  
19 with Pennsylvania State University. Is that  
20 accurate?

21 A. Yes, it is.

22 Q. In the, at the end of the paragraph  
23 at the first bullet, I direct your attention to  
24 the last sentence. As a foundational matter,  
25 were you a participant in this meeting, either

1 directly or by telephone?

2 A. I was on the call I believe, yes.

3 Q. Okay. Do you recall President  
4 Emmert noting that should the university,  
5 meaning Penn State, not agree to this  
6 resolution, meaning the consent decree, the  
7 NCAA would be prepared to take action without  
8 consent? Do you recall him saying words to  
9 that effect?

10 A. Not precisely, consent meaning the  
11 consent decree, I guess.

12 Q. Does reading these words change your  
13 memory at all regarding whether there was  
14 discussion given to the possibility of  
15 unilateral action against Penn State if it  
16 refused to agree to the consent decree?

17 A. I had -- I've got no recollection of  
18 any notion of or thinking that there would be  
19 unilateral action. I would have worked against  
20 that if I somehow thought that was coming down  
21 the pike. But, I don't know what these words  
22 mean. To me, action would be submit it to  
23 Julie Roe and ask her investigators to move  
24 forward.

25 Q. Okay. Your answer and your memory

1 is still the same: At least to your  
2 recollection, no one talked to you about  
3 possible alternatives to the consent decree if  
4 Penn State refused?

5 A. Correct.

6 Q. Now, this vote records the vote as  
7 ten against -- or 10 for, rather, zero against,  
8 zero abstentions.

9 A. Yes.

10 Q. I count more 10 people in the  
11 attendees. Am I counting correctly that minus  
12 President Emmert, that there are 11 attendees  
13 listed here?

14 A. Yeah. Well, Luanna Simon would not  
15 have participated.

16 Q. She would have recused or abstained?

17 A. I see no an abstention either.

18 Q. Do you know why that is?

19 A. I would guess it's a typo.

20 MR. KOWALSKI: I might be wrong.

21 I'm counting 12 other than Emmert.

22 A. Yeah, so that's somebody else.

23 MR. HAVERSTICK: Are you looking at  
24 the first one or the second one?

25 MR. KOWALSKI: 13088 in the

1 attendees.

2 A. Well, Emmert wouldn't vote either.

3 MR. HAVERSTICK: I Count 12 without  
4 Emmert.

5 MR. KOWALSKI: Right. That's what  
6 I've got.

7 MR. HAVERSTICK: I had that question  
8 too.

9 Q. It looks like a typo. It definitely  
10 does not list Ms. Simon as abstaining?

11 A. It doesn't, but I'm sure she didn't  
12 vote.

13 Q. And her an abstention would have  
14 been appropriate because her school is in the  
15 Big 10?

16 A. Yes.

17 Q. Take a look at the next one. Now,  
18 the next document purports to be the same draft  
19 meeting minutes. Do you know -- who is -- I'm  
20 looking at the first cover email. Who is  
21 Bernard Franklin?

22 A. He's the executive vice president  
23 for inclusion. At the time, would have  
24 probably been governance as well. Well, it  
25 says MSAA, so that includes governance,

1 inclusion, and academic and membership affairs.

2 Q. Do you know why some months after  
3 the vote, Janice Whitehead would be forwarding  
4 a document still marked draft to him?

5 MR. KOWALSKI: Objection.

6 A. I have no idea.

7 Q. I didn't think you would. Had to  
8 ask.

9 Go back to the next page, the analog  
10 to the one we just looked at.

11 A. All right.

12 Q. Now, this time, the document  
13 reflects that the motion to approve the consent  
14 decree was voted 12/zero. So now they have the  
15 number right, I think.

16 A. Yeah, it looks like who -- it looks  
17 like they transposed the groups. And, in fact,  
18 they have the wrong attendees. Because there  
19 are more than Division I members listed here.  
20 It would only be the Division I members who  
21 could vote on a board of directors. No, that  
22 says executive committee again. I was thinking  
23 it was the board that voted, the board.

24 Q. Again, Luanna Simon is not listed as  
25 abstaining. It appears instead, she voted.

1 But your recollection is, in fact, that she  
2 abstained?

3 A. Yes.

4 Q. Do you know why these minutes would  
5 have changed from the version that appears to  
6 have been relatively contemporaneous with the  
7 meeting to the one that was forwarded about 6  
8 months later and went from 10/0 to 12/0?

9 MR. KOWALSKI: Objection.

10 Q. If you know?

11 A. I don't know. I'm not very  
12 confident in the people who prepared the  
13 minutes, so I would guess it's human error.

14 Q. Okay. Who does the preparation of  
15 the minutes?

16 A. Delise O'Meally and -- who actually  
17 no longer works at the NCAA -- and Janice  
18 Whitehead would have been involved in preparing  
19 the final copies or drafts.

20 Q. Okay. Let's move on to the next  
21 documents. Now, I'm going to show you, I'm  
22 just going to hand both of them to you now as  
23 Berst 21 and 22.

24 (Berst Exhibit Number 21 marked for  
25 identification.)

1                   (Berst Exhibit Number 22 marked for  
2                   identification.)

3           Q.       Berst 21 is an email, an email from  
4 Donald Remy to Gene Marsh, copying you, re:  
5 ESPN?

6           A.       Okay, yes.

7           Q.       I'm looking at Gene Marsh's second  
8 sentence. And he references comments,  
9 presumably in an ESPN article. Is that ringing  
10 a bell?

11          A.       Yes.

12          Q.       And this would be comments in an  
13 ESPN article related to the implementation,  
14 authorization, whatever word we want to use,  
15 for the consent decree?

16          A.       Yes, for the action taken by the  
17 executive committee, yes.

18          Q.       Yeah, because this is now 7/25,  
19 which would be 3 days after, I think that the  
20 consent decree was agreed upon.

21          A.       Yes.

22                   MR. KOWALSKI: Two, actually.

23                   MR. HAVERSTICK: Two, yeah, maybe  
24 you're right.

25          Q.       Gene Marsh queries whether the

1 comments clearly state the death penalty was  
2 the majority view and then that was pulled back  
3 after looking at other, the alternative  
4 penalties. And that's his typo, not mine.

5 Is he correct that the death penalty  
6 was the majority view?

7 A. In the first call of the executive  
8 committee, yes.

9 Q. Okay. Is he correct that the death  
10 penalty was pulled back after presumably the  
11 executive committee or others looked at  
12 alternative penalties?

13 A. Well, it's probably not careful  
14 language. But the way that moved ahead, while  
15 there was a consensus view clearly in that  
16 first executive committee call, that the death  
17 penalty was the kind of penalty that ought to  
18 be considered and pursued by Mark, Mark  
19 received authorization to evaluate what he  
20 thought the most appropriate penalty was. So  
21 it's characterized here as pulling back, but I  
22 tell you the actual penalty that was designed  
23 is the only one there was that Mark Emmert put  
24 together.

25 Q. And Mark Emmert did not design a

1 program that included the death penalty as a  
2 sanction?

3 A. He did not, no.

4 Q. Do you know why he did not decide  
5 the death penalty was an appropriate sanction  
6 for Penn State?

7 MR. KOWALSKI: I just caution you  
8 not to reveal privileged communications  
9 with legal counsel in answering the  
10 question.

11 A. And I don't know the answer to that.  
12 He would have certainly taken into  
13 consideration comments by all of the people who  
14 we've been talking about involved in meetings,  
15 but the decision was his.

16 Q. Remy replies that he made clear,  
17 which I presume are comments by either  
18 President Emmert or someone else on behalf of  
19 the NCAA in this article, that the death  
20 penalty was in play, and that's a true  
21 statement?

22 A. Yes.

23 Q. And that Penn State's cooperation  
24 helped avoid it. Is that also in your  
25 recollection -- in your recollection of the

1 discourse between you and Gene Marsh; is that  
2 also accurate?

3 A. It's not related to the discourse  
4 between me and Gene. I would hope this is,  
5 that that was a consideration, but it would  
6 have been Mark's.

7 Q. All right. We'll go to the next  
8 one. Now, I'll tell you up front, this is not  
9 an email that you are on, but if we look at the  
10 top -- take your time to look at the whole  
11 thing, but it's really only the top page and  
12 two emails that relate to you.

13 And this conversation is an email  
14 exchange between Shep Cooper and Joel  
15 McGormley.

16 A. Okay.

17 Q. It purports to relay that you and  
18 Donald Remy and Gene Marsh had a heated  
19 conversation regarding the application of the  
20 so-called death penalty last week, which would  
21 have been presumably around July 20th,  
22 presumably prior to the time that the consent  
23 decree was authorized by the executive  
24 committee.

25 Do you recall a pretty heated

1 conversation between the three of you over the  
2 application of the death penalty?

3 A. No.

4 Q. The next one up again purports to be  
5 a representation that Gene Marsh got in your  
6 shorts. I can only assume that means you-all  
7 had a fight.

8 He said that Berst, who had a hand  
9 in writing much of the legislation in 19 and  
10 32 -- and are those references to provisions of  
11 the NCAA bylaws?

12 A. Yes.

13 Q. Over the course of many years during  
14 the '70s, '80s, and '90s, insisted that the  
15 prohibition on competition could be applied in  
16 the PSU case, even thought legislatively, that  
17 doesn't appear true.

18 First, does this cause you to  
19 remember any kind of argument with Gene Marsh  
20 in which you would have indicated that you  
21 wrote the legislation and, therefore, it could  
22 be applied in the Penn State case?

23 MR. KOWALSKI: Objection to form.

24 A. I probably said that to everyone.  
25 And I would have to Gene. But not a heated

1 way.

2 Q. All right.

3 A. Just as a matter of fact. Gene's  
4 discussions in all these instances were simply  
5 straightforward, and he asked very direct and  
6 pointed questions. I responded in the like  
7 manner. I have great respect for Gene. I  
8 think likewise, he does with me. And I did  
9 hold to the view and still do, that the  
10 prohibition against competition can be applied  
11 in any case, even under the new changes that  
12 others have made.

13 Q. Have you ever had a conversation  
14 with Joel McGormley about whether the death  
15 penalty could be applied to a non-repeat  
16 offender?

17 A. I have not, no.

18 Q. Are you aware of whether Gene Marsh  
19 was criticized for his advocacy on behalf of  
20 Penn State in coming up with the consent  
21 decree? I know you didn't negotiate it.

22 MR. KOWALSKI: Objection to the  
23 form.

24 MS. DOBLICK: Objection to the form.

25 A. Whether he was criticized? Not at

1 that time. By a few trustees of Penn State and  
2 probably your client, but I can't imagine  
3 anywhere else.

4 Q. Have you ever had any conversations  
5 with him, in person, telephonic, in which you  
6 discussed respectively, you know, what the  
7 different reactions were to the consent decree  
8 inside each of your clients?

9 A. No.

10 Q. Have you had any conversations with  
11 him at all since this matter about Penn State  
12 that weren't recorded electronically or  
13 otherwise written?

14 MR. KOWALSKI: Objection to form.

15 A. I'm sure I've had -- I've had  
16 occasion to see or talk to Gene briefly couple  
17 or three times a year or somewhere, where he  
18 has appeared at a panel or been on some -- or  
19 even appeared at Penn State, I guess, for  
20 consideration or review of actions taken at the  
21 institution. I'm aware of those kinds of  
22 things. And I believe he's received criticism  
23 in each of those occasions in some form or  
24 another.

25 Q. Have you ever discussed that with

1 him at any of the times you've run into him?

2 A. I've not done any more than what I  
3 just said.

4 Q. All right.

5 A. I don't talk about those things, no.  
6 There was a bunch of other stuff in this  
7 particular document that I don't have any --  
8 you're not trying to use me to get to whatever  
9 that is?

10 Q. Nope. The only reason I showed it  
11 to you at all is those guys happened to be  
12 talking about you.

13 A. Okay.

14 (Berst Exhibit Number 23 marked for  
15 identification.)

16 Q. Next, I'm going to show you -- I  
17 took this a little out of order because I  
18 missed this one before. This is Berst 23.  
19 Now, in the interest of alacrity, I will tell  
20 you that this is an email dated 7/22/12 that  
21 contains a draft of the consent decree and I  
22 think -- yes, I think the draft document is  
23 attached to it, if you want to look at it. But  
24 I don't have questions about the draft itself.

25 A. Okay.

1 Q. I direct your attention to two edits  
2 that are inserted in the top cover email. And  
3 the first -- well, they're both right there  
4 underneath edit to the sentence. The first:  
5 To wit, after serious consideration and  
6 significant discussion. And that appears to be  
7 an insert into language that wasn't there  
8 before about the consent decree. I'll tell you  
9 that that language, after serious consideration  
10 and significant discussion, is in fact, in the  
11 draft attached to this document.

12 A. All right.

13 Q. You can take a look at it if you  
14 want.

15 A. No, I accept that.

16 MR. KOWALSKI: One point of  
17 clarification, Matt. I will confirm this  
18 after the deposition, but I think this  
19 document, the attachment contains redlining  
20 and comments that were sent back to the  
21 NCAA. And it's not showing up in here, and  
22 I don't know if that's a production issue  
23 or if it's just the version. But I will  
24 confirm on our side that you guys have the  
25 version that has the redlining on it.

1 MR. HAVERSTICK: All right.

2 MR. KOWALSKI: It may be --

3 MS. MADDEN: I don't know that we  
4 have seen that.

5 MR. KOWALSKI: I'll confirm that, of  
6 course.

7 MS. MADDEN: Thanks.

8 Q. I'm looking at the insert here after  
9 to wit. Where did the significant discussion  
10 occur regarding the imposition of the death  
11 penalty?

12 A. Well, I think that that would have  
13 occurred in the privileged conversations that  
14 we're talking about.

15 Q. All right. Would that also cover  
16 discussions at the executive committee level?

17 A. Well, to some degree certainly  
18 because there would have been a consideration  
19 of the recommendations by Mark Emmert that  
20 would have been discussed. So certainly that  
21 would have been serious consideration.

22 Q. Without getting into the substance  
23 of the significant discussion, was there, in  
24 fact, significant discussion after Mark Emmert  
25 presented the proposed consent decree to the

1 executive committee, about the dropping of the  
2 death penalty as a possible penalty? I don't  
3 want to know what anybody's view on it was. I  
4 just want to know if, in fact, there was  
5 significant discussion about dropping out the  
6 death penalty as a punishment?

7 MR. KOWALSKI: This is in the  
8 context of meetings with legal counsel?

9 A. Yes, actually.

10 Q. Well, was legal -- it's in the  
11 executive committee discussion where they're  
12 discussing the proposal that I understood that  
13 Mark Emmert offered for what they wanted to do.

14 MR. KOWALSKI: You can talk about  
15 the executive committee meeting. The  
16 internal staff meetings with legal counsel  
17 are privileged.

18 MR. HAVERSTICK: I don't want to  
19 know about that.

20 MR. KOWALSKI: Talk about the  
21 executive committee meeting.

22 A. There would certainly be some  
23 discussion and probably some -- I don't  
24 remember precisely -- questioning about  
25 rationale. But I think by that time, the

1 executive committee was -- had already deferred  
2 to Mark Emmert to come to his best decision  
3 about what to do going forward. The privilege  
4 discussions took place. And by the time they  
5 get back to the executive committee, I think  
6 they were, for the most part, willing to accept  
7 Mark's views.

8 Q. To the extent there were significant  
9 discussions, is it accurate that those  
10 occurred -- I don't want to know what they  
11 were -- but is it accurate that the significant  
12 discussions, to the extent they occurred,  
13 occurred in the privileged setting meetings,  
14 not in front of the executive committee?

15 MR. KOWALSKI: Hold on one second  
16 here. Can you read it again? I'm sorry.  
17 I just want to -- no, no, not that. Can  
18 you read the question.

19 (Record read as requested.)

20 Q. If there were -- if there were  
21 significant discussions, did they occur not in  
22 front of the executive committee but in the  
23 other setting that you determined would be  
24 privileged? And I don't want to know what they  
25 were. I just want to know if that's where it

1 would have happened?

2 A. I'm lost on the nuances.

3 MR. KOWALSKI: Hold on one second,  
4 David.

5 The question is, is that the only  
6 place significant discussions took place,  
7 is that what you're asking?

8 MR. HAVERSTICK: Yeah, I think he  
9 answered that --

10 MR. KOWALSKI: If so, go ahead.

11 A. That's it probably where I'm going.  
12 The more significant discussion and debate  
13 probably took place in the privileged  
14 conversations.

15 Q. Okay.

16 A. But the executive committee  
17 certainly was interested in the thinking of the  
18 president and why --

19 Q. Got it.

20 A. -- you don't have the death penalty  
21 involved.

22 Q. I got it.

23 The second sentence that has been  
24 deleted: Yet by concealing the conduct in  
25 question, the university may have obtained a

1 competitive advantage over an extended period  
2 of time. Do you know why that sentence was  
3 dropped from the consent decree?

4 A. No.

5 Q. Do you agree with the premise of  
6 that statement, that the university may have  
7 obtained a competitive advantage by concealing  
8 the conduct in question, meaning the Sandusky  
9 affair?

10 A. I think I could probably argue it  
11 either way, and I didn't try. That was a  
12 matter that I didn't try to make a value  
13 judgment on and left to others.

14 Q. Do you recall whether -- your answer  
15 was you don't know why that was dropped,  
16 correct?

17 A. Right.

18 Q. So you don't recall any  
19 conversations with others in which someone else  
20 articulated a rationale for dropping that?

21 A. No.

22 Q. You did not feel it particularly  
23 necessary or even particularly accurate enough  
24 that it needed to be included in the document?

25 A. I was not making any of those

1 judgments. My overall thinking was if we have  
2 a consent decree, that that was sufficient for  
3 the executive committee to evaluate action.

4 (Berst Exhibit Number 24 marked for  
5 identification.)

6 Q. Okay. All right. This is Berst 24.

7 A. I know what this is, yes, I  
8 remember.

9 Q. I bet you do. I bet you do. Do you  
10 need a minute to go through it?

11 A. No, I can figure it out as you go.

12 Q. Do you recall the communication from  
13 Dr. Ray that occasioned this email or caused  
14 this email, however you want to describe it,  
15 from Donald Remy to Gene Marsh?

16 A. I don't recall specifically what it  
17 was that set Gene off, although I think it was  
18 maybe continuing either statements or public  
19 statements that he was involved in making. And  
20 from Gene's perspective, Ed Ray was hedging on  
21 whether issues around the death penalty were  
22 being discussed by presidents.

23 And in what I at least understood to  
24 be Ed Ray's behalf at the time, while there  
25 certainly were serious discussions about the

1 so-called death penalty, eventually when the  
2 executive committee provided authority for the  
3 president to evaluate a potential solution that  
4 may or may not include the death penalty, that  
5 I think Ed Ray was emphasizing that period of  
6 time and Gene became upset.

7 And I think eventually it resulted  
8 in this answer back to Gene from Donald Remy.

9 Q. Did you have any conversations with  
10 Gene not reflected in this email about his  
11 unhappiness, displeasure with, however we want  
12 to call it, with what Dr. Ray was saying?

13 A. I believe that yes, I did. I think  
14 he contacted me either by email or by phone  
15 probably saying give me a break. You know,  
16 what's that guy talking about? And puts us in  
17 a difficult position. And at the same time,  
18 the university was making public comments that  
19 may or not be -- may or may not be completely  
20 factual either. So I just kind of left it in  
21 the air.

22 Q. What do you recall emanating from  
23 university folks about the death penalty  
24 imposition?

25 A. I don't have a recollection of what

1 it was. I just remember that that was what was  
2 on the mind of, I believe Donald and/or our  
3 communications people versus, you know,  
4 whatever the Ed Ray comments were.

5 Q. Was Gene Marsh of a view, at least  
6 expressed to you privately, that the death  
7 penalty was -- was a more palpable threat to  
8 Penn State than others may have represented  
9 later on?

10 MR. KOWALSKI: Objection to form.

11 A. It seemed to me that he wanted to  
12 emphasize that point, which I think I  
13 understood. And he didn't think it was  
14 adequately represented by Ed Ray's comments.

15 Q. Are you -- do you have any knowledge  
16 about what was said on any kind of one-on-one  
17 conversation between President Erickson and  
18 President Emmert?

19 A. No.

20 Q. That makes that easy.

21 In Remy's email to Gene Marsh, he  
22 writes, and I'm in the first page, about midway  
23 down: Fifth, in no, capital letters,  
24 communication by David Berst or me, did we ever  
25 threaten the so-called death penalty would be

1 imposed if Penn State did not agree to the  
2 consent decree. Is that a true statement from  
3 your perspective?

4 A. That's a true statement.

5 Q. And I believe you gave testimony  
6 about your discussions with Gene Marsh on when  
7 the death penalty might apply.

8 In fact, the voicemail from David  
9 Berst specifically supports that fact. With  
10 everybody's indulgence, we were provided a  
11 voicemail last night that we think is the  
12 voicemail. Could we play it for you, and if it  
13 rings a bell as being the voicemail, can we  
14 identify it as such?

15 A. Sure.

16 MR. KOWALSKI: Make sure you don't  
17 hit the personal button. Make sure it's  
18 the right one.

19 MS. MADDEN: It was produced by Penn  
20 State. Do you want me to read that.

21 MR. HAVERSTICK: Go ahead and read  
22 that into the record.

23 MS. MADDEN: It's PSU COR 02132.

24 A. Is there a date?

25 MS. MADDEN: I don't have the date.

1           It was not produced with the voicemail.

2           Q.       That's why we'd like to play it.  If  
3           it rings a bell, it rings a bell.  If it  
4           doesn't, it doesn't.

5                   (Voicemail played):  Gene, this is  
6           David Berst.  I think I'll try this.  
7           We're reaching out to Ed Ray to try to get  
8           him to clarify what he means.  And the  
9           transcript from yesterday's press  
10          conference is right on the button.

11                   So your understandings of what our  
12          presidents were talking about in regard to  
13          death penalty are absolutely correct.  And  
14          I know I reiterated that in regard to the  
15          long hard slog, I think I referred to it,  
16          if we were to go back to an enforcement  
17          process in this kind of an instance.

18                   That's what I was trying to reflect,  
19          what I considered to be the mood of the  
20          presidents that I was talking to at that  
21          time about applicability of the death  
22          penalty.  So I think you're right on the  
23          button.  I don't think all of those  
24          conversations were more factual.  
25          Certainly not threatening, I don't think,

1 in any manner.

2 So everybody's got to be a little  
3 careful about how they are talking about  
4 that. That certainly was an issue that  
5 was on the table that eventually, Mark, I  
6 think persuaded our people should not be  
7 considered in the final analysis. So the  
8 consent decree, as you know, didn't  
9 include that. So I hope that helps.

10 Mark's going to be on ESPN and a  
11 couple of other places tonight and will  
12 reiterate his positions. And with any  
13 luck, we'll be able to reach Ed. So I  
14 hope that's helpful. And Donald will  
15 respond related to the eventual time  
16 period. That's probably fine. Thanks.

17 A. It sounds like me. I am not -- I'm  
18 sure that email -- or I mean that voicemail  
19 speaks to the disappointment Gene had over Ed  
20 Ray's comments. I don't think it goes to  
21 this -- what you just read, the communication  
22 by David Berst, meaning did we ever threaten  
23 the so-called death penalty would be imposed if  
24 Penn State did not agree to the consent decree.  
25 I'm not sure that has anything to do with that.

1 Q. After hearing it, are you not  
2 certain that that voicemail is the voicemail  
3 that Gene references in his text?

4 MR. KOWALSKI: Donald references.

5 A. You mean Donald.

6 Q. Donald, sorry.

7 A. I am not sure that it does, because  
8 that seems to just relate to the -- what Ed Ray  
9 was saying in his communications and the hope  
10 that Gene had that Mark Emmert would fix it.

11 Q. Flip over to the next page.

12 A. Okay.

13 Q. The top paragraph: At all times  
14 prior to the execution of the consent decree,  
15 PSU was free to repudiate the Freeh Report,  
16 withdraw its consent, and/or reject the  
17 direction of the NCAA executive committee and  
18 either litigation against an imposition of  
19 penalties by the executive committee or roll  
20 the dice with the enforcement and infractions  
21 process.

22 Does reading this section of Donald  
23 Remy's email refresh your memory as to whether  
24 there was active consideration by NCAA to  
25 impose penalties vis-à-vis the executive

1 committee if the consent decree was rejected?

2 A. I don't think it has anything to do  
3 with that.

4 Q. What does it have to do with?

5 A. I think this says that the  
6 institution was free to repudiate the Freeh  
7 investigation and roll the dice with the  
8 infractions process. I don't know that it -- I  
9 don't think he's to the point where there might  
10 be a consent decree or anything else occurring.  
11 So I don't think you can go that far.

12 Q. You don't read: And either litigate  
13 against an imposition of penalties by the  
14 executive committee?

15 A. Yeah, but I mean, we can be sued any  
16 time. And I hadn't thought about a suit. But  
17 certainly any institution or individual and  
18 certainly some have sued the association to  
19 enjoin us from doing anything for whatever  
20 violation of constitution or other laws is  
21 considered to be appropriate.

22 Q. Either way, your memory is the same:  
23 You don't remember active consideration, at  
24 least expressed to you, to imposing discipline  
25 by the executive committee in the absence of an

1 agreement?

2 A. I not only don't remember it, I  
3 don't believe it happened.

4 Q. You don't believe it was actively  
5 considered, you mean?

6 A. That's correct. You asked me  
7 earlier whether I thought it was conceivable,  
8 basically, that it could occur. And I think  
9 that's possible. But I don't recall anyone  
10 ever conjuring up a sentence that might lead in  
11 that direction.

12 Q. Okay. Skip the next little  
13 paragraph. And then the paragraph after that,  
14 one, two, three, four, five lines down:  
15 Contrary to the suggestions by Penn State and  
16 its counsel, we -- which means NCAA -- were not  
17 provided advance substantive information  
18 regarding the findings of the Freeh Group.

19 Now, I think to your -- as far as  
20 you know, that's a true statement, correct? I  
21 mean, the latter clause, that you were not,  
22 NCAA, provided advance substantive information  
23 regarding the findings of the Freeh Group?

24 A. For me that's correct, yes.

25 Q. And you don't know whether anybody

1 else did or didn't?

2 A. I don't know how -- I'm not aware of  
3 that, no.

4 Q. Okay.

5 A. Did you? No, I'm not aware that you  
6 got it either.

7 Q. And I understand your answer.

8 Do you know who Donald Remy means  
9 when he refers to Penn State and its counsel,  
10 suggesting that NCAA had advance substantive  
11 insight into the Freeh Report?

12 A. Where are you reading now?

13 Q. The clause before the one we just  
14 discussed: Contrary to suggestions by Penn  
15 State and its counsel. I'm asking if you know  
16 who Donald meant by that email or by that, by  
17 that phrase?

18 A. No.

19 Q. All right. Finally, and then we can  
20 move on from this, Donald Remy references  
21 acting general counsel Mark Falkner at Penn  
22 State University. Did you have any interaction  
23 with acting general counsel Mark Falkner during  
24 the interaction with Gene Marsh that led to the  
25 consent decree?

1           A.       I don't know if I did.  If I did, it  
2 would have been someone on the phone with Gene,  
3 but I don't recall that occurring.

4           Q.       All right.  Let's give me 5 minutes.  
5 We want to look at something real quick, and I  
6 think we can run through the last couple things  
7 and we can be done.

8                               (A short break was had.)

9                               (Berst Exhibit Number 25 marked for  
10 identification.)

11 BY MR. HAVERSTICK:

12           Q.       Okay.  Last document I believe I'll  
13 show you is Berst 25.  This is an email from  
14 you to Mark Emmert way back when or again,  
15 early on in the early stages of the Sandusky  
16 stuff, you write to Mark Emmert:  Do you plan  
17 to advise him before the call?

18                               And am I correct in assuming the  
19 "him" to which you refer is Delaney at Big 10?

20           A.       Jim Delaney, yes.

21           Q.       What call, if you remember, are you  
22 mentioning in the first sentence?

23           A.       Well, I believe that that would have  
24 been subsequent to talking about whether he was  
25 going to submit a letter to Penn State.  And in

1 those kinds of instances when something's going  
2 to occur at an institution, I would typically  
3 think of the commissioner as being someone who  
4 needs to be informed. So I was suggesting to  
5 Mark that he talk to Delaney, so he was aware  
6 of the fact we're going to do something in the  
7 Penn State case.

8 Q. Okay. I indicated that you wanted  
9 to visit with him re: PSU follow-up and plan to  
10 call.

11 The discussion that you envisioned  
12 Mark Emmert having with Delany is the one you  
13 just discussed about the letter?

14 A. Yes.

15 Q. To your recollection?

16 A. Yeah.

17 Q. All right. We're done with that  
18 one.

19 Were president -- are President  
20 Emmert and Graham Spanier personal friends, if  
21 you know?

22 A. I don't know.

23 Q. Do you see any reason based on a  
24 prior relationship between, even in the context  
25 of their NCAA relationship, between Spanier and

1 Emmert that Mr. Emmert should have recused  
2 himself from any involvement with deciding the  
3 discipline meted out to Penn State?

4 A. That Emmert should?

5 Q. Yes.

6 A. Are you suggesting somehow he had it  
7 in for Graham Spanier?

8 Q. No. I'm asking whether based on  
9 your view and experience in enforcement,  
10 whether you, sitting here today, would give any  
11 consideration to whether Mr. Emmert should have  
12 recused himself based on their prior  
13 friendship, relationship, professional  
14 relationship?

15 MR. KOWALSKI: Objection to form.

16 A. I don't know what that relationship  
17 would be. He would have been -- Mark Emmert  
18 was a former president at the University of  
19 Washington. Graham, I'm a personal friend of  
20 Graham's, so I don't know. I just don't know  
21 of anything that would lead to recusal.

22 Q. You never gave any thought to you  
23 recusing from the matter based on your personal  
24 friendship with Graham Spanier?

25 A. Well, I didn't have any input in

1 what was going to end up actually occurring. I  
2 was more involved in process. No, I gave that  
3 no thought. Graham Spanier, I have great  
4 respect for. The athletic director, I do as  
5 well. Joe Paterno, I have the utmost respect  
6 for. Know all of them, knew all of them very  
7 well.

8 Q. Can you, if you recall other matters  
9 where you have been deposed, just rattling them  
10 off for us, and when?

11 A. I've been for the last four or five,  
12 I've been saying I've been deposed 30 times,  
13 and I don't intend to say I've been deposed  
14 more than 30.

15 Q. All right.

16 A. But recently, a rock case related to  
17 a one-year grant in aid, the O'Bannon case, the  
18 NIT case. What else has been recent? If you  
19 can name a couple, I've probably been deposed  
20 in them.

21 Q. Just off the top of your head, none  
22 others come to mind?

23 A. I try to repress the memory. I'd  
24 like to forget yours tomorrow.

25 MR. KOWALSKI: How about tonight.

1 THE WITNESS: I can accomplish that,  
2 based on the conversation we had earlier.

3 Q. Are you aware during the Freeh  
4 Group's investigation of Penn State, whether it  
5 was at the same time, soliciting enforcement  
6 work from NCAA? Have you heard that?

7 A. I don't know that, no.

8 Q. Are you aware of the Freeh Group  
9 after the investigation concluded, soliciting  
10 enforcement work from NCAA?

11 A. No.

12 Q. I asked you earlier about the  
13 submission of questions by the -- by NCAA to  
14 the Freeh Group during the investigation. Do  
15 you remember me asking that?

16 A. I remember the question, yes.

17 Q. And you weren't aware of it?

18 A. No.

19 Q. Assume that that happened, that is  
20 the questions were submitted by NCAA to the  
21 Freeh Group as part of its investigation.  
22 What's your reaction to that, considering that  
23 the Freeh Group provided the basis upon which  
24 discipline was ultimately decided by NCAA?

25 MR. KOWALSKI: Objection to form.

1           You're asking him based on that one fact,  
2           no other context whatsoever.

3           Q.     Yeah.

4           A.     And if that's all I've got to work  
5           with in my former life, I would think that  
6           would be an appropriate investigative tool to  
7           try and figure out appropriate questions to ask  
8           to gather information.

9           Q.     Would that be your answer if it was  
10          known ahead of time that NCAA intended to base  
11          any punishment it subjected Penn State to on  
12          the Freeh Report?

13          A.     I don't think that could have been  
14          known at that time. So, you know, I'm not  
15          willing to go too far with you on this.

16          Q.     Okay.

17          A.     Anybody, if somebody comes to me  
18          tomorrow and says how do you investigate a  
19          case, I would probably be willing to help or  
20          answer questions to that effect.

21          Q.     Okay.

22          A.     So I'm answering in that context.  
23          If there was something that was more illicit  
24          somehow implied, I'm not willing to go there.

25          Q.     I don't recall the exhibit number,

1 but it was tab 4.

2 MS. MADDEN: Exhibit 12.

3 Q. Exhibit 12. Why don't I just --

4 MS. MADDEN: The exhibits are in  
5 front of the witness.

6 MR. KOWALSKI: Exhibit 12.

7 Q. 12. I want to confirm something.

8 This email, the original email from  
9 you to the CCA members --

10 A. Yes.

11 Q. -- was the memo distributed to the  
12 CCA members identical in text to this email?  
13 In other words, is there one document that's  
14 more than the other, or is this the document?

15 A. This is the document.

16 Q. Okay. Do you recall whether this  
17 document was ever reproduced or re-sent to  
18 anyone or edited in any way?

19 A. I believe it was probably used by a  
20 couple commissioners to inform some of their  
21 own schools. But otherwise no, I'm not. I'm  
22 not aware of that.

23 Q. How many infractions cases did you  
24 oversee when Gene Marsh was the chair of COI?

25 A. None. I think I mentioned to you

1 before that the only case where we would have  
2 crossed paths would have been during the time  
3 he was a faculty representative at the  
4 University of Alabama.

5 Q. No, I didn't recall that. Okay.

6 With respect to the bylaws, where is  
7 the authority for the imposition of a monetary  
8 sanction of the quantum that was imposed on  
9 Penn State?

10 A. Financial penalties are provided for  
11 in the list of major infractions kinds of  
12 penalties. That would have no bearing on this  
13 case, because as I've said to you several  
14 times, this had nothing to do with the  
15 enforcement process.

16 So a monetary penalty that's a part  
17 of the consent decree and penalty agreed to  
18 between the NCAA and Penn State University,  
19 needs no authority somewhere in the NCAA manual  
20 to agree to, in my opinion.

21 Q. It is dependent solely on the  
22 executive committee's authority to impose  
23 penalties outside the penalty process?

24 MR. KOWALSKI: Objection to the  
25 form.

1           A.       I don't think even that. I think  
2 Penn State could agree to a \$60 million penalty  
3 with the NCAA staff if they wanted to. I don't  
4 know what it would be based on or the outcomes  
5 or whether even any findings would be  
6 necessary. But if they volunteer to provide  
7 \$60 million to victims, they could have done  
8 that on their own motion, even without  
9 consideration by the NCAA. So, you know, I  
10 don't see any lines that have to require  
11 authorization at all.

12           Q.       Did there ever come a time, and  
13 especially in late 2011, when you expressed  
14 some concern about the potential processes  
15 being in place? Did there ever come a time  
16 where you were counseled or where it was  
17 suggested to you that you should adopt the  
18 position that was the more the popular position  
19 or the one being pressed upon by leadership?

20           MR. KOWALSKI: Objection to form.

21           A.       What's the more popular position?

22           Q.       Well, the one that commanded greater  
23 voice and apparently won the day. Let me ask  
24 it another way. There's no secrets. We all  
25 want to get this done.

1           A.       I don't know what that is.

2           Q.       Did there ever come a time where you  
3 felt -- where it was communicated to you  
4 directly or indirectly, that you should conform  
5 your views about what the right process is to  
6 those of Mr. Emmert or those of anybody else  
7 who was articulating that they didn't have your  
8 jurisdictional concern?

9           A.       I would double dog dare anybody to  
10 try. So my views are my views in every  
11 instance, including talking to Mark Emmert.

12          Q.       Understanding that you are probably  
13 within the NCAA, a fairly unique individual  
14 because of your tenure there and knowledge,  
15 have you ever observed anyone there ever -- or  
16 perceived anyone there ever conforming views to  
17 those from dissent into majority? In other  
18 words, is there ever any pressure that you  
19 observed to achieve consensus, that would cause  
20 someone to stop dissenting and get with the  
21 majority view?

22                   MR. KOWALSKI: I will object to  
23 form, and also note that I think he  
24 testified that he came to the NCAA in 1972.  
25 It seems like an impossibly broad question

1 for him to answer, but I don't know.

2 A. It's kind of an amazing answer.

3 Q. I do that.

4 A. Why wouldn't you quash the bait. If  
5 the viewpoint is that the only way -- there's  
6 only one view that has to be conformed to, then  
7 a guy like me could never make it at all  
8 because I often don't conform. And for others,  
9 they have to make their own decisions, I guess,  
10 in that regard. But that isn't the environment  
11 that I have ever known at the NCAA and, in  
12 fact, I wouldn't stand for it.

13 MR. HAVERSTICK: I appreciate your  
14 insight. And I don't have any more  
15 questions. Donna may.

16 MS. DOBLICK: I have no questions,  
17 Mr. Berst.

18 MR. KOWALSKI: Can we go off for one  
19 second, before we do the read and sign and  
20 close, so I can ask you a question?

21 (A short break was had.)

22 MR. KOWALSKI: We'll go back on just  
23 so you get that we want you to read and

24 ///

25 ///

1 sign.

2 (Witness excused, 4:52.)

3 -----

4 DAVID BERST

5 Subscribed and sworn to before me

6 this \_\_\_\_\_ day of \_\_\_\_\_ 2014.

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1 C E R T I F I C A T E

2 STATE OF ILLINOIS )

) ss.:

3 COUNTY OF COOK )

4 I, RACHEL F. GARD, CSR, RPR, CLR, CRR,  
5 within and for the State of Illinois do hereby  
6 certify:

7 That DAVID BERST, the witness whose  
8 deposition is hereinbefore set forth, was  
9 duly sworn by me and that such deposition  
10 is a true record of the testimony given by  
11 such witness.

12 I further certify that I am not  
13 related to any of the parties to this  
14 action by blood or marriage; and that I am  
15 in no way interested in the outcome of this  
16 matter.

17 IN WITNESS WHEREOF, I have hereunto  
18 set my hand this 13th day of November, 2014.

19  
20 -----

21 RACHEL F. GARD, CSR, RPR, CLR, CRR

22

23

24

25

1 NAME OF CASE: Jake Corman v. NCAA

2 DATE OF DEPOSITION: 11/12/14

3 NAME OF WITNESS: David Berst

4 Reason codes:

5 1. To clarify the record.

6 2. To conform to the facts.

7 3. To correct transcription errors.

8

9 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

10 From \_\_\_\_\_ to \_\_\_\_\_

11 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

12 From \_\_\_\_\_ to \_\_\_\_\_

13 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

14 From \_\_\_\_\_ to \_\_\_\_\_

15 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

16 From \_\_\_\_\_ to \_\_\_\_\_

17 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

18 From \_\_\_\_\_ to \_\_\_\_\_

19 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

20 From \_\_\_\_\_ to \_\_\_\_\_

21 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

22 From \_\_\_\_\_ to \_\_\_\_\_

23 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

24 \_\_\_\_\_

25 David Berst